THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case No. IT-02-54-R77.5-A

BEFORE THE APPEALS CHAMBER

Before: **Judge Patrick Robinson, Presiding**
Judge Andrésia Vaz
Judge Theodor Meron
Judge Burton Hall
Judge Howard Morrison

Registrar: **Mr. John Hocking**

Filed: **9 October 2009**

IN THE CASE OF

Florence HARTMANN

PUBLIC VERSION

FLORENCE HARTMANN'S APPELLANT BRIEF

On behalf of Ms Hartmann
Karim A. A. Khan, Lead Counsel

Guénaël Mettraux, Co-Counsel

***Amicus* Prosecutor**
Bruce MacFarlane, QC

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Impugned findings

1. At **paragraph 32** of the Judgment, the TC held that

   (i) "there is no merit in the interpretation of the Indictment by the Defence that the Accused is only charged with having disclosed Four Facts"

   (ii) "Nothing in the text of the Indictment gives rise to the unreasonably restrictive interpretation of the charges as advanced by the Defence."

   (iii) "The Defence cannot validly claim that its understanding of the Indictment met with no objection by the Prosecution."

2. At **paragraph 33**, the TC held that it was satisfied that the Accused had "disclosed more information than the Four Facts identified by the Defence" and proceeded to list those.

3. At **paragraphs 34-35**, the TC suggested that the legal reasoning contained in a confidential decision of the Tribunal is subject to confidentiality and to Rule 77(a)(ii) if disclosed.

Procedural background

4. On 9 January 2009, the Defence filed a "Motion for Clarification Pertaining to Confidential Status of Facts Relevant to the *Hartmann* case". In light of the lack of clarity pertaining to the nature and scope of the charges against Ms Hartmann and because all facts for which she was charged were understood by the Defence to be in the public domain, the Defence thereby sought clarification, from the Chamber as to what facts the Defence was permitted to discus in its public filings so as to guarantee and protect Ms Harmann's right to a public trial.

5. The *amicus* Prosecutor did <u>not</u> respond to the Defence Motion.

6. The Trial Chamber failed to rule upon the Defence application, thereby providing no guidance to the Defence as to what was or had been considered to be subject to a confidential order and what facts were said to remain subject to the confidential orders.

7. On 9 January, the Defence also filed a "Motion for Reconsideration or Stay of Proceedings". At pars.73.*et.seq*, the Defence pointed to the inadequacies and

uncertainty of the pleadings.[1] Having reviewed all material relevant to identifying the nature/scope of the charges, the Defence concluded that what Ms Hartmann was alleged to have disclosed to the public in breach of court orders:[2]

(i) the existence of the two impugned decisions;

(ii) the confidential character of these decisions;

(iii) the identity of the moving party/applicant;

(iv) the subject, namely, the fact that protective measures were granted in relation *the documents*.

8. On 13 January, the Defence was ordered by the Trial Chamber to re-file its Motion within page-limit.[3]

9. On 14 January, the Defence re-filed its "Motion for Reconsideration" and reiterated its understanding that the charges pertained solely to the four facts mentioned above.[4]

10. On 19 January, the *amicus* Prosecutor responded to the Defence Motion for Reconsideration.[5] In that filing, the *amicus* took no issue with the accuracy of the understanding/rendition of the charges by the Defence.

11. On 15 January, the Defence filed its "Pre-Trial Brief of Florence Hartmann". After pointing to "factual inaccuracies and other shortcomings" pertaining to the charges, the Defence again outlined the charges against Ms Hartmann as being made solely of the four facts.[6] It also made clear its understanding that no other facts –in particular, not the "legal reasoning" of the Appeals Chamber– formed part of the charges against Ms Hartmann.[7]

12. The *amicus* did not react to these submissions and did not take issue with this rendition/understanding of the charges.

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[1] See,in particular,pars.73,75.
[2] Ibid,pars.80,103.
[3] Order to Defence to Resubmit Filing in Accordance with Word Limit.
[4] See,in particular,pars.15-18
[5] Prosecution's Response to Defence Motion for Reconsideration.
[6] Pars.4-6,9.
[7] Pars.9-22.

13. On 30 January, a status conference took place during which the Presiding Judge raised issues pertaining to the nature of the case against Ms Hartmann.[8] The Defence reiterated its understanding that the charges solely pertained to the four facts and pointed to the fact that the *amicus* had taken no issue with it.[9] At that hearing and being invited to address these issues, the *amicus* Prosecutor did not specifically identify any other fact as forming part of the charges, nor of the case that he intended to lead against Ms Hartmann.[10] Relevantly, none of the additional facts in relation to which Ms Hartmann was convicted (as appear in par.33 Judgment) were identified by him as relevant to this case. Defence counsel insisted that any departure from the Defence understanding of the charges will amount to

> "a shifting of the goalposts and one that we on behalf of Ms Hartmann will take the very strongest exceptions to."[11]

The Defence also highlighted the fact that it was acting in accordance with a "legitimate expectation" that its understanding of the charges was corrected as it had not be rebutted by the *amicus* insofar as it never pointed to any other facts that could have formed the basis of a conviction against Ms Hartmann.[12] The Presiding Judge agreed –or, at least, did not take issue– with the view of Defence counsel that it was not the responsibility of the Chamber to interfere with the parties' and, in particular, the Prosecutor's understanding of the charges.[13]

14. On 2 February 2009, six month after the indictment of Ms Hartmann, spurred as he had been by the Presiding Judge's comments, the *amicus* filed a "Statement of *Amicus Curiae* Prosecutor Concerning an Issue Raised by the Chamber during 30 January 2009 Status Conference". In that document, for which no legal basis exists (and none mentioned), the *amicus* referred to paragraphs 10,11,18 and 19 of his Pre-trial Brief and referred to the charges as pertaining to "the existence, contents and purported effect of the two Appeals Chamber decisions [and] to [their] confidential nature" and said that he respected the "different" position of the Defence but

[8] T.52.*et.seq.*
[9] T.53-55.
[10] T.56.
[11] T.57.
[12] T.54-55.
[13] T.55-56.

"disagreed" with it. He also said that his position would be "confirmed" during the opening statement.[14] Again, the *amicus* identified none of the supplementary facts later identified by the Chamber as relevant to Ms Hartmann's conviction. However, as discussed below, the TC (footnote 74 Judgment) relied on pars.4-5 of that "Statement" to suggest that the Defence had had notice of these facts. The text of the "Statement" makes it clear that this is not the case.

15. On 15 June, the *amicus* gave his opening statement.[15] He mentioned none of the supplementary facts identified by the TC in par.33 Judgment.[16]

16. On the same day, the Defence gave its opening, referring explicitly to the four facts as forming the sole basis of the charges (and the basis upon which the Defence was proceeding to trial).[17] The *amicus* did not react, nor take issue with the Defence's understanding/rendition of the scope/nature of the charges.

17. The parties proceeded to trial upon that basis and understanding.

18. On 2 July, the Defence filed its Final Trial Brief. In paragraph 1, it identified the four facts in relation to which Ms Hartmann had been validly charged and in relation to which the trial had proceeded. In footnote 1, the Defence also noted that "The indictment does not allege that the book contains any other contemptuous material."

19. The *amicus* filed its Final Brief on the same day. He did not take issue with the Defence understanding of these four facts as basis of the charges. Nor did he mention any of the supplementary facts on which the TC relied in par.33.[18] Nor did he do so in final arguments, which took place 3 July.

Relevant legal standard

20. The law of the Tribunal is clear: the Prosecution must give "detailed" and "timely" notice of the charges against the accused so that he/she may adequately prepare his/her case, confront it and meet it.[19]

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[14] Pars.4-6.
[15] T.118-120.
[16] The Defence does not concede that utterances during opening statement would constitute valid notice for the purpose of Article 21(4)(a).
[17] T.124.
[18] Again,the Defence does not concede that such mention would have been relevant to the requirement of prompt/detailed notice pursuant to Article 21(4)(a).
[19] E.g.*Kupreskic* AJ,pars.88.*et.seq*.

21. The Appeals Chamber has made it clear that this requirement applies with particular force in relation to "contempt".[20] The Appeals Chamber has held that inadequate pleadings in contempt proceedings would warrant dismissal or overturning of a conviction.[21]

22. In this case, the TC has based its conviction on facts that

(i) did not (and/or could not) form part of the charges and/or

(ii) facts that had been inadequately pleaded, so as to violate Ms Hartmann's fundamental right and create great unfairness.

Notice of the facts on which conviction was entered was neither detailed, nor prompt.

Errors as to scope of charges

23. The TC erred in law and/or fact when suggesting that any other facts relevant to the charges had been validly pleaded so that Ms Hartmann could be said to have received detailed and timely notice of those.

24. In particular, the TC erred in law and/or fact, and violated Ms Hartmann's fundamental rights, by interpreting broadly the nature and scope of the charges and when suggesting, at par.32, that the Defence's understanding was "unreasonably restrictive". In so doing, it erred in law and/or fact, further by shifting the burden to the Defence to adequately *understand* the charges (as conceived by the TC), rather than onto the prosecuting authorities to provide adequate notice of those.

25. The TC erred further in law/fact when suggesting at par.32 that only "the text of the Indictment" was relevant to determining the scope/nature of the charges. The jurisprudence of the Tribunal makes it clear that where the indictment lacks specificity, further particulars may be provided by other pre-trial filings, if timely and detailed.[22] This is what the Defence endeavored to do by reviewing those filings that pertained/referred to the case against Ms Hartmann in an effort to identify the charges.[23]

26. As a result, and in addition, the TC erred in law/fact when suggesting that the new facts mentioned at pars.33-35 Judgment (i) formed part of the charges against Ms

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[20] E.g.*Aleksovski* in *Nobilo* AJ,pars.17,55-56;*Kanyabashi*,Decision of 10 July 2001

[21] *Nobilo* AJ,par.17.

[22] See,e.g.*Krnojelac* AJ,par.138;*Delalic*,Decision of 21 February 1997,par.8;*Krajisnik*, Decision of 1 August 2000,par.13.

[23] Defence Motion 9 January 2009, pars.75.*et.seq*;Defence Motion for reconsideration,14 January 2009,pars.14.*et.seq*.;PTB,pars.9.*et.seq*.

Hartmann and/or (ii) that she had received detailed/prompt notice of these. In particular,

(i) There is no mention in any of the relevant pleading instruments to (i) "the content of closed session transcripts of the Applicant's submissions in this case", (ii) "the legal reasoning applied by the Appeals Chamber", (iii) "the confidential submissions made by the Prosecution contained in the text of the second Appeals Chamber Decision", nor did the Defence receive the necessary(detailed/prompt) notice of any of those. In fact, the Defence made it explicitly clear that it was its understanding that the "legal reasoning" of the AC did not form part of the charges.[24] The *amicus* never took issue with this view, nor (validly) claimed that this formed part of the charges against Ms Hartmann.

(ii) The Trial Chamber erred in law and/or fact when suggesting that expression such as "purported effect" (as mentioned in paragraph 33 of the Judgment and in the Indictment) would provide adequate notice of the charges as required by Article 21(4)(a).

(iii) In addition, and in the alternative, to the extent that such expression could be said to provide a basis for the purpose of notice, the TC erred in law/fact and abused its discretion when it failed to consider (or rejected) the reasonable possibly that this could be understood by the Defence as it was, i.e., that it referred to the fourth fact identified by the Defence (iv) ("the subject, namely, the fact that protective measures were granted in relation the records/minutes of Serbia-Montenegro's Supreme Defence Council ("SDC")"), which was made public (by the Tribunal and the Applicant, as well as in the media) so that, contrary to the Chamber's assertion at par.33 (and 73,79), this fact was already in the public domain.

(iv) In addition, and in the alternative, the Trial Chamber erred in law/fact and abused its discretion when taking the view that the Defence had had adequate and timely notice of the fact that such an allegation formed part of the charges against Ms Hartmann. The record of these proceedings, as outlined above, reveals just the opposite.

[24] PTB,pars.10-22;FTB,pars.8 *et seq*.Also Defence Motion 9 January 2009,pars.90-102;Defence Motion for reconsideration,14 January 2009,pars.15,18.

27. The TC erred in law and/or fact when suggesting that Ms Hartmann had been validly charged and been given detailed/prompt notice with disclosing "the content of closed session transcripts of the Applicant's submissions".[25] The pleading instruments contain no traces of that allegation.

28. In addition, the TC failed to establish that Ms Hartmann had been aware at the time of publication that

(i) the facts disclosed in her book came from confidential transcripts and, if they were, that they

(ii) were subject to Rule 77(a)(ii) and remained so at the time of publication thereby erring in law and fact.

In the alternative, the TC failed to consider and/or exclude the reasonable possibility that Ms Hartmann might have been mistaken about that fact.[26]

29. The TC erred in law and/or fact when concluding that certain information discussed in Ms Hartmann's book had come and could only have come from the impugned decisions and, if they did, that Ms Hartmann was aware of that fact and deliberately disclosed that information with or despite that knowledge.[27] In particular, the TC erred in law and/or fact when suggesting, at par.33, that

1) the book of Ms Hartmann
   (i) contains reference to the content of closed session transcripts of the Applicant's submissions,
   (ii) that Ms Hartmann would have been aware of that fact and
   (iii) that this has been established beyond reasonable doubt,
2) when suggesting that
   (i) Ms Hartmann's book contains reference to "confidential submissions made by the Prosecution contained in the text of the second Appeals Chamber Decision", that
   (ii) Ms Hartmann would have been aware of that fact and that
   (iii) this has been established beyond reasonable doubt.

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[25] Par.33.
[26] Also,below,pars.174*et seq*.
[27] *Ibid* and evidence referred therein.

30. The TC erred when suggesting (in footnote 73) that the Defence "legitimate expectation" had somehow been refuted by the statement of the Prosecutor in par.6 of its Response *re* Reconsideration:[28] the paragraph in question is a response to Defence submissions regardgin the legal elements of the offence under Rule 77(a)(ii). It has nothing to do with the scope/nature of the charges. The TC's reliance upon that statement to rebut the Defence's legitimate expectation was in error. No such rebuttal as might have been relevant to Article 21(4)(a) notice ever occurred (at a time or in a way relevant to that guarantee).

31. The TC also points (in footnote 73) to pars 18,19 and 21 of the *amicus* PTB to suggest that the *amicus* had set out clearly "what he believed to be the scope of the Indictment". This was an error insofar as pertained to the requirement of detailed/prompt notice of the charges as interpreted by the TC. Relevantly, none of these paragraphs refer to any of the additional facts uncovered by the TC at par.33 Judgment and which form the basis of Ms Hartmann's conviction.

32. And whilst the TC was correct to note that the *amicus* in his filing had pointed to a "disagreement" between the parties as to the nature/scope of the charges, it failed –and therefore erred– to note that

(i) the *amicus* did not provide any further or adequate notice of what that disagreement related to,

(ii) nor pointed to any of the par.33 facts as being subject to that disagreement, so that this "disagreement" was not, and could not have been, relevant to establishing whether Ms Hartmann had received "detailed" and "prompt" notice of the additional facts.

(iii) The TC's reliance on that filing of 2 February 2009 is itself a violation of the statutory guarantee of "prompt" notice, which means "as soon as the charge is first made"[29],i.e., in 27 August 2008, and thus an additional error of law.

33. The TC erred in law and/or fact when failing to consider the fact that, had the Prosecutor taken issue with the substance of the Defence's understanding of the nature and scope of the charges, he would have been required, as a minister of justice

[28] Judgment,par.3.
[29] HRC,General Comment 13,par.8.

and as an impartial prosecutor,[30] to clarify this matter. In particular, the TC erred in law, at par.32 (in particular in footnote73), when interpreting the –scope and/or nature of the– obligations/duties of the *amicus* Prosecutor in that regard. Contrary to what the *amicus* (and the TC) had viewed as the consequence of an *adversarial* process,[31] the Practice Direction makes it clear that an *amicus* Prosecutor must act, not in adversarial fashion, but "impartially" as he is an "agent" or "*amicus*" of the Chamber on whose behalf he prosecutes the case.[32] The *amicus* failed to do so, and the TC erred by failing to require him to do so and/or by failing to draw the necessary inferences from his conduct.

34. The TC erred in law and/or fact when it failed to take notice of various specific occasions where the Defence outlined its understanding of the charges and where it should have drawn the necessary inference from the failure to the *amicus* to rebut the substance of that understanding by pointing to any other facts said to be relevant to the charges and upon which the TC eventually based its conviction.[33] This constitutes a grave breach of Ms Hartmann's fundamental rights (in particular, Article 21(2)-(4)(a)(b)(d)). In addition, and in the alternative, the Trial Chamber erred in law/fact and abused its discretion when it failed to conclude that the *amicus* Prosecutor was estopped/precluded from going beyond the scope of the charges which the Defence had publically and repeatedly identified as relevant to this case and which he failed to correct, if indeed he had taken issue with the nature/scope of those in any way that could have prejudiced the Defence.

Errors as to scope of R77(a)(ii)

35. The TC erred in law and/or fact by expanding the scope of the indictment to facts that are not subject to R77(a)(ii) and/or for which that Rule provides an adequate legal basis.

36. The TC can only punish the disclosure of what can, in the first place, be protected by a confidentiality order. Rule 54*bis* clearly provides that protective

[30] See requirement of "impartiality" in IT/227,par.15(ii).
[31] Judgment,footnote.73 in light of *Amicus* Statement of 2 February,par.5.
[32] IT/227,par.15(ii).
[33] Whilst the TC took notice of the Defence position in its PTB, opening statement and FTB, it did not take notice of the fact that this position had been openly laid down (without reaction on the part of the *amicus*) in its motions of 9 January, 14 January and again in its closing speech (see above).

measures may be order in relation to "documents or information" (Rule 54*bis*(F)-(I)). It does not provide a legal basis for the protection of the legal reasoning of a Chamber, nor for any of the four facts and/or supplementary facts *unless the disclosure of such facts would result in the disclosure of the actual contents of the "documents or information" that are the subject of the protective measures.* The AC has made it clear that what can validly be the subject of a confidential order (and, therefore, of contempt proceedings if breached) is the confidential information for which protective measures have been ordered under the Rules.[34] In this case, as already noted, Serbia-Montenegro only sought protective measures (in accordance with Rule 54*bis*) in relation to "the contents of the redacted sections of the Supreme Defence Council documents".[35] No protective measures was sought or granted in relation to any of the four facts, nor in relation to the supplementary facts of par.33. The legal reasoning or other such facts could only arguably be subject to R77(a)(ii) if and where the disclosure of that reasoning had the effect of disclosing the actual content of the "documents or information" for which measures have been granted. That was not part of the allegations, nor has it been established in this case.[36] Nor does international law provide for a general principle that would permit the criminalisation through contempt of such facts.[37] In other words, the TC erred by relying upon R77(a)(ii) to sanction the disclosure of facts for which there was no legal basis to order protective measures in the first place and in relation to which the Appeals Chamber had ordered none. By using R77(a)(ii), it sought to use the contempt jurisdiction of the Tribunal to protect facts in relation to which there is no valid legal basis to maintain their confidentiality.

37. In the alternative, if one accepts, as the TC put it, that what was being protected in this case were the interests of "of a sovereign state", in view of the fact that (i) Serbia-Montenegro identified those interests to be the continued protection of the "the contents of the redacted sections of the Supreme Defence Council documents" and that (ii) as noted in par.35 Judgment, Ms Hartmann was not charged

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[34]REDACTED

[35] D10,par.59.Also, REDACTED*Milosevic* Second Decision 23 September 2004.T.483-487,444-446,466-472,479-480;D9,pp.33,37,40-41,93;T.276-280;404;466-472;479-480;483-487;392,398-403.

[36] Judgment,par.35.

[37] See,e.g.,T. T.270-276,312-315, 342;D11.

for disclosing the content of these documents, there could not have been a violation of a protected interest for the purpose of Rules 54*bis*/77(a)(ii).

38. The TC erred in law when suggesting that the facts mentioned in pars.33-35 come within the terms of Rule 77(a)(ii) and/or that this provision would provide an adequate legal basis to criminalise the disclosure of such facts. In particular,

(i) The TC erred in law when suggesting that the disclosure of the "legal reasoning" of the Appeal Chamber's decisions could be a basis for conviction under Rule 77. Rule 77(a)(ii) does not provide an adequate legal basis for this, or not one consistent with the principle of legality(foresee ability/accessibility). Nor does international law provide for a general principle as would permit the criminalisation of such disclosure. Rule 77(a)(ii) is not pure Judge-made law. Any conduct criminalized by the Tribunal must have a basis in international law:[38] customary law or general principles. In this case, there is no state practice/*opinio juris* as would support the view that customary law criminalises the disclosure of "legal reasoning" of a court. Nor is there a general principle to that effect. As explained by Mr Joinet, the view is – under both human rights law and certain domestic legal systems– that the disclosure of this could not form the basis of contempt/outrage proceedings. In fact, as noted in PTB (pars.10-22), all relevant legal indications are that disclosure of the "legal reasoning" is not and cannot be criminalized under R77(a)(ii).[39] The AC has also made it clear that what can validly be the subject of a confidential order (and, therefore, of contempt proceedings if breached) is the confidential information for

[38] *Nobilo* AJ,par.30;*Vujin* AJ,pars.13,24.

[39] See e.g.PTB,pars.10-22 and references;FTB,pars.8-17 and references (incl. *Milutinovic* Decision,12 May 2006, par.34-35,footnotes 78 and 79 (and footnotes 7,14,15,16,17,20 and 66);*Milutinovic*, Decision,15 May 2006,footnotes 12 and 42;*Milutinovic* Prosecution Reply,10 April 2007,par.10 and footnote 9;*Nobilo* AJ,pars.17,36; *Vujin* AJ,pars.12-13 and 16;*Delic* Decision 23 August 2006,p.4,footnote 10; *Delic* Decision 14 January 2008,p.3,footnote 8; *Perisic*, Order 22 September 2006,p.2,footnote 3; T.181-188; *Milutinovic* Prosecution Reply 10 April 2007,par.10 and footnote 9; REDACTEDRule 54*bis* provides for a valid legal basis to order protective measures (such as redaction) in relation to "documents or information" (Rule 54*bis*(F)-(I)).See also T.263,271-276,283-287;312-315;342;393-394;406-408;D10,par.58;D9,pp.25,33-34,37-38,41;D1;D2;D5,pp.4-5;D3;D4;D6;D11;D48.Decision on Urgent Prosecution Motion Seeking Variance, Non-Disclosure Order and Leave to Amend the Rule 65*ter* Exhibit list,30 June 2009,p.4).

which protective measures have been ordered under the Rules.[40] If there was any doubt in the regard, the principle of legality required that (i) the law be interpreted narrowly and that (ii) any doubt be resolved in favour of Ms Hartmann. If legal reasoning of decisions was subject to R77(a)(ii), the Tribunal would

(a) become un-accountable for its actions,

(b) act contrary to its commitment to transparency,

(c) act contrary to its established practice[41] and

(d) render a "contrôle de la legalité" of its action, as forms part of human rights law, impossible/illusory.[42]

(ii) In addition, and in the alternative, the Trial Chamber erred in law and/or fact when failing to consider whether, or dismissing the possibility, that Ms Hartmann could reasonably have taken the view that the facts for which she was convicted were not covered by Rule 77 and could therefore be discussed publically.[43] In that respect, the TC erred when it failed to consider, *inter alia*, that (i) Ms Hartmann is not a lawyer, (ii) that the law on this point would be, to say the least, ambiguous, that (iii) in the legal system with which she would be most familiar as a journalist –the French one– disclosure of the legal reasoning could not constitute contempt/'outrage'.[44] The TC also failed to take into consideration any of the facts outlined and identified by the Defence in pars.110-123 FTB, which were all relevant to that matter and which created (at the least) a reasonable doubt/inference on that point.

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[40]REDACTED

[41] FTB,pars.11-13 referring to *Milutinovic* Decision 12 May 2006,pars.34-35,footnotes 78 and 79 (and footnotes 7,14,15,16,17,20 and; *Milutinovic* Decision 15 May 2006,footnotes 12 and 42;*Delic* Decision 23 August 2006,p.4,footnote 10; *Delic* Decision 14 January 2008,p.3,footnote 8;*Perisic*, Order 22 September 2006,p.2,footnote 3; T.181-188;Decision on Urgent Prosecution Motion Seeking Variance, Non-Disclosure Order and Leave to Amend the Rule 65*ter* Exhibit list,30 June 2009,p.4;*Milutinovic* Prosecution Reply 10 April 2007,par.10 and footnote 9.

[42] T.263,271,275,283-287.

[43] See,generally,Judgment, pars 63-67.See also, below, issues pertaining to grounds of appeal *re* "mistake of fact/law".

[44] T.271,275,312-314,342;390-391;D1;D2;D5;D6;D36.FTB,par.16.

Prejudice

39. To establish a violation of a fundamental right, a defendant does not have to demonstrate that he/she suffered a prejudice. The violation of his/her rights is *per se* a prejudice that calls for a remedy.

40. However, and in this case, the prejudice suffered by the Defence as a result of the TC's impermissible enlargement of the charges was, at the least, threefold:

(i) The *amicus* was not put to the task of proving that the additional facts mentioned in par.33 were disclosed knowingly in violation of a court order and that they (i) were not already in the public domain, (ii) had not been the subject to an *actus contrarius*, or (iii) had not been waived by the Applicant. Nor did the *amicus* in fact attempt to do so as he never identified those as facts relevant to his case.

(ii) Having no notice of these allegations, the Defence was unable to call or tender evidence in relation to those. Nor did the Defence have reason nor an opportunity to ask questions of prosecution/defence witnesses as might have been relevant to these new facts/allegations.

(iii) The TC based its conviction against Ms Hartmann as regard these additional facts without any evidence having been led by the *amicus* (and no evidence) that the facts mentioned in par.33 were disclosed knowingly in violation of a court order and that they (i) were not in the public domain prior to publication, (ii) had not been the subject of an *actus contrarius*, or (iii) had not been waived by the Applicant. In other words, its conclusions on that point are solely based on an impermissible negative inference that, in the absence of evidence either way, these facts must be regarded as having been proved.

Right to independent/impartial Tribunal

41. The TC also violated Ms Hartmann's right to an independent/impartial tribunal as well as her right to a fair trial. By expanding the charges beyond the case articulated by the *amicus*, the TC effectively took over the prosecution of Ms Hartmann and set out the charges against her, creating a factual basis that the *amicus* had not –or not validly– put forth as his own for the purpose of prosecuting the case.

In so doing, the Trial Chamber committed an error of law in violation of these fundamental rights.

Conclusions

42. Each and all of these errors, individually or in combination, meet the requisite standard of review[45] as they would warrant, as the AC pointed out, the dismissal or overturning of a conviction.[46]

43. At par.79 Judgment, the TC acknowledged that all four facts had been in the public domain prior to the publication of the impugned book/article. The TC did not make clear whether Ms Hartmann was being convicted in relation to the new facts only (as identified in par.33) or in relation to those *and* the four facts.

44. It could be assumed from the jurisprudence of the ECHR (see below) (had it been applied by the TC) that a conviction could not have related to the four facts and that the conviction could only pertain to the additional facts. If that is the case (and the text of the Judgment leaves that possibility open), a finding that the TC impermissibly extended the scope of the charges would necessarily lead to the conclusion that Ms Hartmann should be acquitted.

45. If, however, Ms Hartmann was convicted in relation to both the four facts and the new facts, the AC would be required to quash the conviction insofar as pertains to the new facts and turn to the next grounds of appeal insofar as pertains to the four facts.

II. VIOLATION OF FUNDAMENTAL RIGHTS OF MS HARTMANN AND ASSOCIATED ERRORS – FREEDOM OF EXPRESSION

Impugned findings

46. The impugned findings are contained in pars.70-74 Judgment. These paragraphs contain findings which constitute grave errors of law and/or fact all of which pertain to the fundamental right of Ms Hartmann (and that of the public) to the respect and protection of freedom of expression. The standard applied by the TC falls short of relevant international standards, which has resulted in impermissible/illegal

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[45] Regarding relevant/applicable standards of review,see,e.g.,*Stakic* Appeals Judgment, pars.7-13;*Furundzija* Appeals Judgment, pars.34.*et.seq*.

[46] *Nobilo* AJ,par.17;*Kupreskic* AJ,pars.88.*et.seq*

curtailment of this fundamental right. The TC also erred in fact in its consideration and assessment of the evidence/facts relevant to the curtailment of this right.

Errors as to the relevant legal standard

47. The TC erred in law when failing to apply or misapplying international law to determine the scope of protection guaranteed by international law to freedom of expression.[47] In particular,

48. The TC erred in law when suggesting that the standard that it applied to this matter "is consistent with the jurisprudence of the European Court of Human Rights".[48] Instead, the standard applied in this matter flies in the face of ECHR law. In its filings, and all through the case, the Defence referred to four (4) ECHR cases that are on point and the most relevant precedents to this case. The TC managed to not consider, not acknowledge (apart from an irrelevant reference in footnote 165 to one paragraph of one of these cases) and not apply any of the four cases nor any of the principles that are laid down therein:

- *Weber v Switzerland*;[49]
- *Dupuis v France*;[50]
- "*Spycatcher*" 1 and 2;[51]

Many other relevant cases/precedents (cited by the Defence) were ignored.[52] Had theses and the principles they contain been applied by the TC, it could only have been concluded that the restriction of Ms Hartman's freedom of expression through a criminal conviction was impermissible under international law.

49. The "disclaimer" in par.23 Judgment may not displace the TC's complete failure

(i) to take the Defence's submissions/authorities on that point into account and, in any case,

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[47] Judgment,pars.68-74.
[48] Judgment,par.70.
[49] Judgment,22 May 1990(Application no. 11034/84).
[50] Judgment,7 June 2007 (final 12 Nov.2007,Application no. 1914/02).
[51] Judgment,26 November 1991,Series.A,No216;(1992),14 EHHR 153;Judgment of 26 November 1991,Series.A,No217;(1992) 14 EHHR,229.
[52] FTB,pars.124.*et.seq* (e.g.*Fressoz;Rizos and Daskas;Hrico; Orban;Chauvy;Kulis;Guja;Bergens Tidende*).

(ii) to do what the TC said it was responsible for (footnote 176 *in fine*), namely, to apply the correct legal standard and

(iii) Such a generic disclaimer cannot make up for the Chamber's duty and defendant's right to a reasoned opinion.

50. Space does not permit the Defence to delve extensively into the principles set out in those decisions. These have been set out in pars.124 *et seq* FTB and are adopted by reference (in particular, pars.141-157 pertaining to the four above cases). All have this in common: the ECHR found that the criminal conviction of individuals who had publically disclosed information that were already in part in the public domain but were still covered by judicial confidentiality orders contravened Article 10 ECHR as disproportionate and unnecessary. The same principle was applied by this Tribunal in the *Maglov* contempt proceedings.[53]

51. The TC also erred in law by failing to account for that fact -and failing to acknowledge– that under international human rights law generally, there is a strong presumption of unrestricted publicity of any proceedings in a criminal trial.[54] The TC made no reference to that principle, did not acknowledge any of the case law relevant to it (nor the Defence submissions/authorities) and failed to apply it to its considerations. Instead, the TC treated freedom of expression as merely one of a set of equally-important factors to be weighed against one another.[55] As a result, the legal parameters that were applied to this case were not in conformity with recognized standards of international law and the TC erred in finding that the restriction/curtailment of this fundamental right was permissible/proportionate in the circumstances.

52. The Trial Chamber erred in law by failing to apply the principle recognized under international law that restrictions to freedom of expression (in particular, as regard journalists and issues of public interests) must be interpreted strictly, applying, instead, an expensive interpretation of its powers under R77(a)(ii) and interests which it says are protected by that provision.[56] The TC made no reference to the principle of strict curtailment, did not acknowledge any of the case law relevant to it (nor the

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[53] *Maglov* Decision 19 March 2004,pars.9-10.

[54] See e.g. x *In re S (A Child)*,par.15.Also *Scott v Scott; AG v Leveller Magazine Limited*; and *Re Trinity Mirror Plc*.Also,*Ekin*,par.56;*Dupuis*,pars.33-35.

[55] See,in particular, pars.69.*et.seq*.

[56] E.g.*Rizos/Daskas*,par.38;*Spycatchr1*,par.65;*Spycatcher2*,par.53. D31,par.20;D39;T.244-245,347;D31,par.11;UN GA resolution 59/1 of 14 December 1946;T.244.

Defence submissions/authorities) and failed to apply it to its considerations. As a result, the legal parameters that were applied to this case were not in conformity with recognized standards of international law and the TC erred in finding that the restrictions/curtailment of this fundamental right was permissible/proportionate in the circumstances. In fact, they went far beyond any international precedent that was relevant to this case.[57]

53. The TC erred in law and/or fact when failing to consider the special/increased protection guaranteed to the discussion of issues of public or general interest by international law in the context of the exercise of freedom of expression.[58] As noted by the ECHR, there is little scope under the Convention for restrictions on debate of questions of public interest.[59] The Court has recently acknowledged, for instance, that the freedom of journalists to write work/book about issues of general interest could hardly be curtailed.[60] The fact that the matters discussed by Ms Hartmann in its impugned publications are issues of general/public interest was not in dispute between parties and was well established in evidence.[61] Where, as in the present case, such interests are present, they provide increased protection that can be curtailed

> "only [on] the most pressing grounds".[62]

No such grounds existed, none was alleged and none has been established in evidence. A conviction, in those circumstances, was unwarranted, unfair and inappropriate.

54. The Trial Chamber also erred in law and/or fact when it failed to acknowledge and take into consideration, not only Ms Hartmann's freedom of expression, but the right/interest of the public (in particular, the right of victims as members of the public) to receiving the information that was the subject of the charge as was relevant

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[57] See,again,*Dupuis*;*Weber*;*Spycatcher1*;*Fressoz*.
[58] See references in next footnotes.
[59] E.g.*Hrico*,par 40(g);*Dupuis*, par 40;*Rizos/Daskas*, par 38;*Orban*,par.45;*Chauvy*,par.68.
[60] *Orban*, pars.45, 49;*Rizos/Daskas*, par.42 (and 38); *Kulis*,par.37. Also D31, page 6; T.252,284-285.
[61] FTB,par.129;T.137-138,257-260,290-297,389-390et seq;457-460,464-466;D1;D2;D5;D6;D10;D42; D36;D46;D9.
[62] *Sunday Times* Report,par.247(emphasis added).See also *Guja,* also *De Haes and Gijsels*.

and necessary under international law.[63] As a result, one of the most important factors in deciding the permissibility of a curtailment – i.e., the right and interest of the public to receive that information – was left out of the TC's considerations.

55. The TC erred in law/fact when failing to determine whether its decision was consistent with the Tribunal's commitment to transparency and responsibility towards the victims –as members of the public– as outlined in par.7 of SC resolution 827 (which the TC failed to acknowledge despite the Defence's extensive reference– FTB,pars.111-119). Nor did the TC acknowledge the holding of the AC in *Tadic* and the significance thereof for the purpose of criminalising the circulation of information relevant to the public and to victims in particular:

> "That is not to say that the Tribunal's powers to deal with contempt or conduct interfering with the administration of justice are in every situation the same as those possessed by domestic courts, because its jurisdiction as an international court must take into account its different setting within the basic structure of the international community."[64]

This failure/error of the TC was relevant to determining the permissible right/interest of the public, in particular victims, not only to receive but to continue to discuss the facts discussed in Ms Hartmann's publications and thus the scope of permissible curtailment. By convicting Ms Hartmann, the TC as effectively criminalized any further discussion of these facts in the public and by the victims themselves breaching the right recognized to the public to receive information that are subject to freedom of expression.

56. As a result of these errors, the legal parameters that were applied to this case were not in conformity with recognized standards of international law and the TC erred in finding that the restriction/curtailment of this fundamental right in the form of a criminal conviction was permissible/proportionate in the circumstances.

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[63] E.g *Spychatcher1*,par.61,65-66; *Chauvy*, par 67;*Dupuis*,par.41;*Fressoz*,par.51;See also *Brdjanin* Decision 11 December 2002,par.37;T.390-400

[64] *Vujin* AJ,par.18.

Errors as regard "necessity" and "proportionality" of restriction

Relevant legal standard

57. The Trial Chamber erred in law (and/or fact) when it failed to apply the international standard relevant to the curtailment/restriction of Ms Hartmann's freedom of expression.[65] Under existing international law, any restriction to a fundamental right is subject to proof having been made of its "necessity in a democratic society".[66] To meet that standard, the interference would have to "correspond[d] to a 'pressing social need'".[67] The adjective "necessary" "is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable' and that it implies the existence of a 'pressing social need'".[68]

58. Under ECHR law, the "necessity" so defined must be "convincingly established".[69]

59. In addition, under existing international law, the interference would have

(i) to be "proportionate" to the legitimate aim pursued and

(ii) the reasons adduced to justify it be "relevant and sufficient".[70]

Any interference must, therefore, be the least invasive/intrusive measure that is consistent with the legitimate aim pursued.[71] The ECHR has identified a range of considerations relevant to assessing that matter which were identified by Mr Joinet in his evidence (but ignored by the TC–footnote 176) and laid out by the Defence in its FTB,pars.141-159.

60. The applicability of these principles to ICTY proceedings has been duly acknowledged by the Appeals Chamber.[72] For instance, in a Decision of 12 February 2009, Judge Kwon made it clear that any restriction of an accused's freedom of

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[65] See, in particular,Judgment,pars.68-74.
[66] Art.10(2)ECHR.
[67] *Spycatcher1*,par.62;*Handyside*,pars.48-50.
[68] *Spycatcher1*,par.59.
[69] E.g.*Dupuis*,par.36.
[70] Ibid,par.36-38; *Spycatcher1*,par.62;also*Handyside*,pars.48-50.
[71] *Milosevic*,Decision on Interlocutory Appeal of Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004,par.17 and references;also,*Dupuis*,pars.36-38;*Goodwin*,par.40
[72] E.g.*Milosevic*, Decision of 1 November 2004 (Interlocutory),pars.17-18 and references cited.

speech should be subject to the principle of proportionality.[73] He also made it clear that such restrictions would not be in order unless a failure to do so "would compromise [the] achievement of the Tribunal's mandate".[74] As he noted, restrictions of this right are all the more inappropriate where, as in the present case, there is no evidence to indicate that the defendant "intends to undermine the Tribunal's mandate".[75]

61. The TC failed to acknowledge, and apply, that decision and all others to which the Defence had made reference.[76]

TC's errors

62. The TC erred in law and/or fact by failing to subject the evidence to the relevant international legal standard/requirements for restriction of freedom of expression.

63. First, the TC erred in law and/or fact when it failed to establish and/or to seek to establish that the restrictions to Ms Hartmann's freedom of expression (and the right of the public to receive that information) in the form of a criminal conviction was "necessary" (as defined above) in the circumstances. Had it done so, the TC could not reasonably have concluded that such curtailment (through criminal conviction, i.e., the most intrusive of all restrictions) was "necessary". Having found that her publications had created a real risk that states "*may*" be deterred to cooperate,[77] no *ex post facto* conviction of Ms Hartmann could possibly undo that risk (even if it existed[78]) so as to render it "necessary" in the circumstances. That conclusion is all the more evident as the TC did not seek to prohibit the sale or continued distribution of the impugned publications which remain freely available in shops and on internet.[79] The incongruity of a criminal conviction in these circumstances is best illustrated by reference to the four ECHR cases mentioned

[73] *Karadzic* Decision 12 February 2009, in particular pars.18,19,21 and 23. See T.292-293,315-319,349,360-374.
[74] Ibid,par.20.
[75] Ibid,par.22(emphasis added). There was ample evidence that she had no such intention (P1.1,1002-1,3-4/10.Also P2.1,1003-2,2/13;P1.1,1002-1,4/10;T.144-146;492-494;*Ruxton Statement*,p.4; T.137;145;384-386;492-494). The *amicus* actually conceded that Ms Hartmann had not acted with reprehensible motives (Defence Motion pursuant to Rule 65*ter*,7 February 2009).
[76] FTB,par.127.
[77] Judgment,par.74.
[78] See below.
[79] Judgment,par.82.

where, in similar circumstances, the ECHR concluded that a criminal conviction could not be regarded as necessary, nor would it be consistent with freedom of expression, as protected under international law.[80]

64. The TC erred in law/fact when it failed to apply or misapplied the requirement of "proportionality". The TC appears to have acknowledged that an issue of proportionality was relevant to assessing the legality of the curtailment of Ms Hartmann.[81] Unfortunately, it erred in law when it misunderstood the nature of that test or misapplied it. At par.74, *in fine*, where the TC appears to be discussing the issue of proportionality, it measured, on the one hand,

(i) "trial proceedings for contempt" against

(ii) "the allegations" raised against Ms Hartmann.

These, however, were not the issues that the TC had to consider in relation to the principle of proportionality. As noted above, what needs to be measured/compared under that principle is, on the one hand,

(i) the interference/restriction to the right in question (which in this case came in the form, not of "proceedings" against Ms Hartmann, but of a criminal conviction) and, on the other,

(ii) the legitimate aim being pursued (in this case, the good administration of justice).

65. The fact that the TC sought to measure the wrong factors led it to disregard each and all factors relevant to the test of proportionality (i) as identified by *inter alia* the ECHR/human rights bodies and (ii) as appeared on the record.[82] This might explain the TC's additional failure --and further error-- to consider any of these facts as had been identified and put forth by the Defence in submissions and in evidence.[83] It might also explain the TC's additional failure/error to apply that test (of proportionality) to deciding-

(i) whether a criminal conviction was appropriate in the circumstances and

[80] See cases above at par.48.FTB,pars.151-157.
[81] Judgment,par.74.
[82] See next sub-section.
[83] Ibid.

(ii) whether the sentence which it imposed was itself necessary and proportionate and why it failed to even consider or address the Defence's submission that a conditional discharge would have been sufficient.[84]

66. The TC's legal errors (and parallel errors of fact) as to the legal parameters of that test (in particular, what needs to be proportionate to what and what facts are relevant to make that determination) rendered the TC's assessment as to the permissibility/adequacy of a criminal conviction and sentence erroneous, misguided and unfair.

Errors pertaining to the evaluation of the permissibility of restrictions to freedom of expression

67. The TC erred in fact and/or law when misinterpreting the significance, importance or weight of certain considerations/factors relevant to the curtailment of that fundamental right or failing to identify, consider and/or give due weight to those factors. In particular,

68. The TC erred in law and/or fact and abused its discretion when it failed to take into account any of the facts relevant to determining the necessity/proportionality of a curtailment/restriction of Ms Hartmann's freedom of expression *as were favourable to Ms Hartmann*.[85] The fact that not a single one of these factors is weighed and considered excludes any fiction/assumption that the TC regarded them as relevant and/or considered any of them in coming to its decision. As is clear from human rights caselaw, each of these facts were relevant to that consideration and the TC erred in ignoring them or failing to give them due weight. As noted above, the TC's general disclaimer cannot make up for its failure to provide a reasoned decisions in relation to this matter.

69. Whilst noting, at paragraph 71, that journalists might be sanctioned for conduct related to their exercise of freedom of expression, the TC erred in law and/or fact when it failed to acknowledge/weigh in the special and increased protection guaranteed by international law to journalists in the exercise of their freedom of

[84] See *Dupuis*,par.47;*Brima* Sentencing Judgment,pars.35-36;FTB,pars.168-171.
[85] See FTB,pars.151-159 and references therein.

expression.[86] There is no mention of that fact or to the law relevant to that factor in the Judgment. This constitutes both an error of law and/or fact.

70. For the same reason, the TC's failure to account for (i) the right of the public to receive that information,[87] (ii) the fact that the exercise of freedom of expression in relation to issues of public/general interest may only be exceptionally curtailed,[88] that (iii) there is a strong presumption of full enjoyment of that right,[89] that (iv) any restriction must be interpreted strictly,[90] that (v) the TC failed to apply or misapplied the principle of proportionality,[91] (vi) failed to establish the "necessity" of Ms Hartmann's right through criminal conviction,[92] all constitutes discrete/separate errors of law and/or fact and also provide evidence of the TC's errors in deciding on the permissibility, legality and propriety of the curtailment of Ms Hartmann's fundamental right.

71. The TC also erred in law/fact and abused its discretion when taking into consideration and/or giving undue weight to certain factual considerations when assessing the proportionality/permissibility of curtailment of Ms Hartmann's freedom of expression. The first of two considerations/facts which the TC identifies as relevant to its conclusions (par.73) is the fact that the book is said to contain information that was not in the public domain which the TC considered to be a "salient" fact for the purpose of weighing competing public interests. In support of its view, the TC cites *Stoll v Switzerland* (pars 113 and 115). In the circumstances relevant to the present case, this ECHR decision in fact supports the exact opposite of what the TC sought to have it say. By the TC's own reckoning, the publications of Ms Hartmann contain material that was in part already in the public domain and some which, *it says*, was not in the public domain.[93] Par 113 of *Stoll* upon which the TC relied says this (emphasis added): "The present case differs from other similar cases in particular by virtue of the fact that the content of the paper in question had been completely

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[86] E.g.*Orban*, pars.45, 49;*Rizos/Daskas*, par.42 (and 38,45); *Kulis*,par.37;*Dupuis*,pars.34-39 & 46;*Bergens Tidende*,par.52;*Sunday Times* Report,pars.231-248;*Sunday Times*,Judgment 26 April 1979,pars.42-68; *Brdjanin* Decision 7 June 2002, par.30. Also D31, page 6; T.252,284-285.

[87] See above.

[88] See above.

[89] See above.

[90] See above.

[91] See above.

[92] See above.

[93] Judgment,pars.73,79.

unknown to the public (see, in particular, *Fressoz and Roire*, cited above, § 53; *Observer and Guardian*, cited above, p. 34, § 69; *Weber*, cited above, pp. 22 et seq., § 49; *Vereniging Weekblad Bluf!*, cited above, pp. 15 et seq., §§ 43 et seq.; *Open Door and Dublin Well Woman*, cited above, p. 31, § 76; and *Editions Plon*, cited above, § 53)." What the ECHR was saying is that, in all other cases (to which it could have added *Dupuis*,par.45 and *Weber*,par.51) in which the ECHR had found that some information –though not all– which had been disclosed in breach of a court order was already in the public domain, a restriction/interference with freedom of expression through a criminal conviction for disclosing more such information constitutes a disproportionate and impermissible restriction of that right. Again, the findings of the ECHR in *Dupuis* and *Weber* are on point and mean that, under that standard, Ms Hartmann had to be acquitted. The application of that jurisprudence to the present case would mean that even if some of the information disclosed by Ms Hartmann was not already in the public domain, a curtailment of her freedom of expression through a criminal conviction would constitute a disproportionate and impermissible curtailment of that right.

72. The second fact apparently regarded as relevant to the TC's considerations in that regard is the interest of the Applicant, Serbia-Montenegro, to protect the content of SDC minutes.[94] The Trial Chamber erred in law and/or fact and/or abused its discretion by giving undue or disproportionate weight to the interests of this or other States in this context.[95] First, as conceded by the TC itself, those interests were never at risk since Ms Hartmann did not disclose and was not even charged with disclosing the content of these documents,[96] which Serbia-Montenegro had sought to keep confidential.[97] Secondly, whilst State cooperation is necessary and important to the work of the Tribunal, a criminal conviction pursuant R77(a)(ii) should not be seen as a way to enforce states' statutory obligations. Under Article 29 Statute, cooperation with the tribunal is compulsory/mandatory, not subject to any sort of satisfaction with the Tribunal's enforcement of orders, which is what the TC's holding makes it to be. Also, Serbia-Montenegro never suggested –and there is no evidence of Serbia-

[94] Judgment,par.72(and74) and above.
[95] See in particular Judgment,pars.72-74, 80-81.
[96] Judgment,par.35.
[97] D10, pp.27-28,par. 59;FTB,pars.3-7.Also*Milosevic* Second Decision 23 September 2004.T.483-487,444-446,466-472,479-480;D10;D9;T.276-280;404;466-472;479-480;483-487;392,398-403;D9.

Montenegro– suggesting that its interests had in any way been interfered with by Ms Hartmann's publications. Finally, there was no evidence that any of its interests had been *actually* –as opposed to potentially– interfered with and the TC acknowledged that much so that only minimum weight (if any) could have been given to this consideration.[98] The TC's basis for curtailment consists of two hypotheticals (disclosure "may" lessen cooperation which "may" impact on the administration of justice) that have no basis in the evidence and falls short of what would render the criminalisation of such disclosure "necessary" as defined above.[99]

73. The TC's focus on the need to protect States' interests reveals another error. The Trial Chamber erred in law (and/or fact) by merging into one question the two issues that were relevant to testing the permissibility of any restrictions to Ms Hartmann's – and the public's – freedom of expression, namely,

(i) the issue of a legitimate aim pursued by the measure and

(ii) the issue of the proportionality/necessity of the restriction that results from it (in this case, through a criminal conviction).

Thus, at paragraph 74, having determined that the Tribunal had an interest worthy of protection (the good administration of justice, which the Defence never disputed was a "legitimate interest/aim"), the TC concluded from it that criminal prosecution was proportionate to the risk incurred. Instead, what the TC was required to do was

(i) to take notice of the fact that the good administration of justice by the Tribunal (namely, the Tribunal continued ability to prosecute/punish serious violations of IHL) was a legitimate aim for the purpose of curtailing the exercise of fundamental rights;

(ii) to take into consideration all relevant facts relevant to the test of proportionality/necessity; and

(iii) to determine whether, in light of those factors and considering the legitimate aim being pursued, the restriction/interference of her right through a criminal conviction was "necessary", "proportionate" and reasons adduced to justify are "relevant and sufficient".

This, the TC failed to do and, therefore, erred in law and/or fact.

[98] See Judgment,par.74 ("real risk" and "may").
[99] See,above.

74. For all those reasons, the TC erred in law and/or fact and abused its discretion when reaching the view –if indeed it decided this matter– that a conviction of Ms Hartmann would constitute a "proportionate" curtailment of her right to freedom of expression in the circumstances relevant to this case.[100]

75. Finally, and as already noted, the TC erred in law and/or fact when it failed to determine whether less intrusive sanctions –in the form of a conditional discharge, for instance[101]– would have been sufficient and proportionate in the circumstances or, if it considered it, erred in law and/or fact and abused its discretion when rejecting it as unreasonable/disproportionate.

Conclusions

76. The standard applied by the TC has no support in international law (whether customary or general principles) and in fact violates recognized standards of human rights law and falls far short of the legal and constitutional traditions of many member States of the United Nations. It has resulted in the impermissible curtailment of Ms Hartmann's freedom of expression and criminalisation of conduct beyond the scope of what was permitted under R77(a)(ii) and international law. This, in turn, resulted in an unfair and unsafe conviction that, if permitted to stand, would set a dangerous precedents for journalists, historians and victims of mass atrocities.

77. In view of the above, the AC should

(i) acknowledge the TC's errors,

(ii) take note of the fact that the errors meet the relevant standard of review/appeal,

(iii) apply the correct legal standard,

(iv) take all relevant facts into account and, on that basis,

(v) overturn the conviction of Ms Hartmann as it would constitute an impermissible/disproportionate curtailment of her and the public's freedom of expression.

(vi) Enter a not guilty verdict.

[100] Judgment,par.74(in particular).
[101] FTB,pars.168-171.

III. VIOLATION OF FUNDAMENTAL RIGHTS OF MS HARTMANN AND ASSOCIATED ERRORS – RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL

Procedural background

78. Based on the conclusion of a special panel that two of the Judges of the original Trial Chamber lacked the appearance of impartiality,[102] the President of the Tribunal ordered the replacement of these two Judges.[103]

79. On 21 April 2009, the Defence filed an application pursuant to which the Defence asked that the record of all decisions/orders rendered by the impugned Trial Chamber be set aside.[104]

80. By decision of 19 May 2009, the Trial Chamber rejected the Defence Motion in its entirety and proceeded with the impugned record.[105] As a result, Ms Hartmann's fundamental rights, in particular her right to a fair trial and her right to an independent/impartial tribunal was seriously violated.

TC's errors

81. The TC erred in law when applying an incorrect legal standard (at par.8) to resolve the Defence application for the setting aside of the impugned (pre-)trial record of decisions/orders. In particular, the TC erred in law when suggesting that the principle identified by the Defence (in pars.11-18 of its Motion) did not constitute a general principle of law. The *amicus* did not put forth any authority as contradicted those set forth by the Defence; nor did the TC identify any. There is no indication of what body of law (customary law, general principles) the TC claimed to be applying in this matter. There is no indication that the law that it has applied to this matter is in any way anchored in –international- law. In addition, and in the alternative, and to the extent that a general principle of law was necessary to decide the matter, the ruling of the Trial Chamber fails to demonstrate that the basis which it adopted to dismiss the Defence Motion represents a general principle of law.

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[102] Report of Decision on Defence Motion for Disqualification of 27 March 2009.
[103] Order Replacing Judges of 2 April 2009.
[104] Motion Pertaining to the Nullification of Trial Chamber's Orders and Decisions ("Motion").
[105] Decision on Defence Motion Pertaining to the Nullification of the Trial Chamber's Orders and Decisions (thereafter, "Impugned Decision").

82. Legal authorities, and factual considerations, supporting the Defence application were contained in its Motion.[106] Limitation of space does not allow the Defence to lay them down again so that it refers to and adopts those referred to in its Motion of 21 April.[107] Suffice to say that existing precedents overwhelmingly supported the Defence Motion that based on the finding of the special-panel/President, the setting aside of the (pre-)trial record was both necessary and appropriate.[108] Particular attention should be paid to the only international precedent that could be identified; it support(ed) fully the Defence position and the TC erroneously disregarded, misinterpreted and/or rejected it.[109]

83. The TC also erred in law when suggesting that the Rules did not provide guidance.[110] As noted by the Defence, Rule 15*bis* prevented the TC to validate decisions that had been rendered by only one judge that met the basic requirement of impartiality (the other two having been disqualified).[111] Furthermore, the Statute (Article 12(1), in combination with Article 21) to which the Rules are subject provided all the necessary guidance: a defendant is entitled to a trial (and, therefore, to a trial record) that is not subject to any suspicion of lack of impartiality. Because all the orders (including the order in lieu of indictment) challenged by the Defence Motion had been rendered by a TC that lacked the appearance of impartiality, they are suspect of the same shortcoming. The facts/factors put forth by the Defence as a basis for the disqualification of two judges and taken into consideration by the judges to disqualify them, included incidents that occurred both *before* and *after* the indictment of Ms Hartmann. In other words, Ms Hartmann was indicted by a TC that lacked the appearance of impartiality. That same Chamber dismissed many Defence applications challenging the legality and integrity of an investigation that led up to that indictment, and which had been carried out under the authority and pursuant to instructions of the

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[106] Motion,pars.11.*et.seq*.
[107] Ibid.
[108] See e.g., Pinochet Judgment at 125, 137, 139, 143, 146; *Dimes v Proporietors of Grand Junction Canal*, 3 HL Case. 759 (in particular per Lord Campbell, at 793-794);*Sellar v Highland Railway Co.*, 1919 SC (HL) 19;*Bradford v McLeod*, 1986 SLT 244; *Reg v Altrincham Justices, ex parte N Pennington* [1975] QB 549, at 552 (per Lord Widgery CJ);*Antoun v R* [2006] HCA 2; *Gassy v The Queen* [2008] HCA 18;*S v Dube and Others* (523/07) [2009] ZASCA 28 (30 March 2009),in particular pars 18-21;Pinochet Judgment,at 139,per Lord Nolan.
[109] *Karemera*,Decision of 7 Dec 2004,pars.14,20-23.
[110] Judgment,par.8.
[111] Impugned Decision,par.16 and Motion,par.16.

TC.[112] The finding that two of the Judges of the TC lacked an appearance of impartiality rendered these decisions suspect of the same deficiency.

84. The TC erred in law and/or fact in par.10 when suggesting that Ms Hartmann's right to a fair trial had not been prejudiced. First, the TC erred by requiring the Defence to establish a "prejudice" as resulting from the violation of Ms Hartmann's fundamental right by the TC. Such a requirement has no support in international law (a violation of a fundamental right *per se* calls for a remedy) and erroneously reverses the onus of establishing the need for a remedy where a violation has occurred. Secondly, the TC erred in law/fact when misinterpreting/misunderstanding the nature of the prejudice caused to Ms Hartmann and erred when concluding that no such prejudice had been established. The prejudice made to Ms Hartmann's fundamental rights, and not just that to a fair trial, was that she has been investigated, indicted and, for a time, subject to decisions pertaining to her rights (procedural or otherwise) by a Chamber that was found to lack the basic requirement of impartiality towards her; she was, therefore, denied the benefit of the consideration and decisions taken by a bench of judges that did not suffer from such flaws.

85. The TC erred in law and/or fact when suggesting that proof that it was "in the interests of justice" to set the record aside was a supplementary requirement to be met in these circumstances.[113] In this case, where the special bench and the President had found that the original bench lacked the appearance of impartiality, the setting aside of the record came, as the *Karemera* Chamber put it, "as a consequence of" their decisions. The TC erred further when suggesting that the "interests of justice" was a factor to be weighed against the rights of the accused to a fair trial.[114] In fact, these rights form a part of what would constitute the interests of justice. Instead of being a counter-weight to these rights, the "interests of justice" to which the *Karemera* Chamber referred is an additional basis/reason to support the setting aside of the record, instead of being a reason to decline to set it aside. As is clear from par.10, the TC equated the absence of "prejudice" to the accused's right to a fair trial to that of "interests of justice". That was wrong in law and an error.

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[112] Defence Motion for Disqualification, 3 February 2009.
[113] Impugned Decision,pars.9-10.
[114] Par.9.

86. Furthermore, and even if the requirement of "interests of justice" had applied, it was clearly in the interests of justice to set aside these decisions and orders. All decisions pertained to important decisions going to the legitimacy/legality of the investigation and conduct of these proceedings. The case was still at pre-trial so that practical consequences would have been limited. In the *Karemera*, the record was set aside despite the fact that the trial had already started and witnesses had already been heard. Contrary to the TC's suggestion (pars.9,11), the fact that the bias was one of *appearance* rather than *actual* bias did not justify departure from existing precedents. *Karemera* (as well as many of the relevant domestic precedents) was(were) also about apparent, rather than actual, bias. International law does not draw any distinction between the two as far as concern the consequences of that bias. Both are grounds for disqualification and there is no support for the suggestion that one should be regarded as less serious than the other. As noted by Judge Trechsel,

> "[a] judge who in fact is perfectly impartial but does not seem so, *is not impartial* for the purposes of Article 6§1 [ECHR]".[115]

87. Additionally, even if the TC's position had been correct in law, it is telling that whereas the TC pitted the rights of the accused against what it saw as "the interests of justice" in relation to "decisions and orders relating to non-substantive matters" (par.10), it failed to do so in relation to the order in lieu of indictment (par.11). This means that the TC did not even consider the fact that Ms Hartmann has been indicted by a TC that has been found to lack the basic, necessary, minimum requirement of appearance of impartiality. The interference that results to Ms Hartmann's right to a fair trial is self-evident: Ms Hartmann did not get a fair trial. Instead, she got to be indicted by a Chamber that in the course of the investigation and thereafter had committed acts that a special panel and the President of the Tribunal found raised serious doubts about the Chamber's impartiality. In those circumstances, the TC's decision to proceed with the impugned record constitutes an error of law and fact and an abuse of the process as would warrant the nullification of all Trial Chamber decisions rendered thereafter, including the Judgment.

[115] S. Trechsel, *Human Rights in Criminal Proceedings*,p.63.

88. These grave violations have not been cured by the superficial overview that the TC said it conducted. As already noted, the TC's finding regarding the alleged absence of a "prejudice" to the accused's fair trial right (as regard "decisions and orders relating to non-substantive matters") has no legal or factual merit.[116] Nor has the TC been able to exclude the reasonable possibility that the original TC's apparent bias might have played a part in any of these decisions. In other words, the stain of the appearance created by the original TC continues to attach to its decisions.

89. When considering the effect of the original TC's lack of impartiality in relation to the order in lieu of indictment, the TC erred further in law/fact and abused its discretion by undertaking what it said was a review of the supporting material and found that such material was sufficient to proceed against Ms Hartmann.[117] The TC had no authority and no valid legal basis to do so. Furthermore, it erred further as it

(vi) failed to give a reasoned opinion on that critical point so that its adequacy/legality cannot be adequately ascertained,

(vii) had no way to exclude the reasonable possibility that the apparent bias of the impugned Chamber might have played a part in the way in which the original TC had conducted the investigation, shaped that investigation (through its instructions to the *amicus* investigator) or when confirming the charges. As noted above, the finding of an appearance of lack of impartiality put all actions of the TC under a cloud of suspicion, which the new TC has not in any way dispelled.

90. In addition, and in the alternative, the TC's finding as to the alleged sufficiency of the supporting material to ground contempt proceedings would create an appearance of lack of impartiality on its part that would justify the disqualification of the Chamber and the annulment/setting aside of their subsequent decisions and Judgment.[118]

Conclusions

91. In light of the above, the AC should

(i) find that the TC has erred in law/fact and abused its discretion,

[116] Impugned Decision,par.10.See,above.
[117] ImpugnedDecision,par.11.
[118] See, generally, *Kyprianou*, and authorities cited in the Motion on Disqualification,pars.15.*et.seq*.

(ii) find that each and all of these errors, individually or in combination, meet the relevant standard of review as they resulted in a trial that does not meet basic requirements of fairness/impartiality necessary to the authority/jurisdiction of the TC and which were a condition of the legality of any finding prejudicial to the defendant, and

(iii) correct the TC's errors by applying the relevant legal standards and taking into account the relevant factors and

(iv) set aside the record of all decisions rendered by the impugned TC so as to render null and void all subsequent proceedings, including the Judgment.

(v) set aside the charges/conviction against Ms Hartmann and enter a not guilty verdict.

IV. ERRORS OF LAW/FACT AND *ACTUS CONTRARIUS*

92. The Trial Chamber erred in law and/or fact when it failed to ascertain and/or to acknowledge that each and all facts in relation to which Ms Hartmann had been validly charged had been made public by the Tribunal itself through *actus contrarius*.[119] The Trial Chamber further erred in law and/or fact and abused its discretion by convicting Ms Hartmann despite that fact.

93. In par.40, the TC suggests that the Tribunal's public references were limited to

> "the existence of the Appeals Chamber Decisions"

and that

> "its references to the law contained in the Appeals Chamber Decisions [did not] amount to an *actus contrarius* by the Tribunal".[120]

Both findings are in error. The Tribunal made public much more than the "existence" of these decisions, and its *actus contrarius* was in no way limited to "references to the law" contained in these decisions.

[119] FTB,pars.18-33.
[120] Par.40.

94. The *actus reus* of contempt under Rule 77(A)(ii) is the physical act of disclosure of information relating to proceedings before the Tribunal, when such disclosure would breach an order.[121] There must, therefore, be disclosure of previously confidential information.[122]

95. It was common ground between the parties that the Prosecutor has to establish, not only that the information had been made confidential by an order of the court, but that it was treated by the Tribunal as confidential at the time relevant to the charges.[123]

96. The Appeals Chamber has acknowledged that Chambers have the power to lift the confidentiality of decisions, not just by a formal order, but by an "*actus contrarius*".[124] No particular form is required to achieve that result. The Tribunal's practice is replete with examples of Chambers lifting the confidential character of decisions/orders –in whole or in part– by disclosing their existence or content in public decisions/orders.[125] For instance, on 19 May 2009, the TC rendered a confidential decision. Though that decision, its existence, subject-matter and effect were confidential, during the status conference of 19 May Presiding Judge, Judge Moloto, made a reference to the existence (including subject-matter and purported effect) and confidential nature of this decision during a public hearing.[126] The confidentiality as to the existence and status of that decision was lifted by Judge Moloto's statement which effectively acted as a waiver of the confidentiality of the matters mentioned publically.

97. In such circumstances, the material/information which is publically disclosed by the Chamber is not being "treated as confidential" thereafter so that further disclosure of that information could not form the *actus reus* of the crime of contempt.[127] In such a case, the confidentiality that might have attached to these facts/information disclosed publically has effectively been lifted by an *actus contrarius*.

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[121] *Marijacic* TJ,par.17.
[122] Ibid.
[123] REDACTED FTB,par.20.
[124] *Marijacic* AJ,par.45.
[125] Ibid.footnote 20,21;also*Milosevic* Order 27 April 2007,par.2; Hartmann Indictment par.1;*Delic* Decision 23 August 2006;*Delic* Decision 14 January 2008; *Perisic* Order 22 September 2006 (in relation to the same impugned decisions).
126 T.19 May 2009,p.78.
[127] See,again,e.g.,*Marijacic* TJ,par.17

98. As had been made clear at trial, each and all of the four facts for which Ms Hartmann had been validly charged had been made the subject/object of an *actus contrarius* on the part of the Tribunal.[128] The TC erred in law/fact and abused its discretion when it failed to acknowledge and take account of that fact and convicted Ms Hartmann despite the absence of *actus reus*.

99. On 27 April 2007, then ICTY President, Judge Pocar, issued a public "Order Assigning Judges to a Case before the Appeals Chamber". At page 2, Judge Pocar referred publically to the existence of the first impugned Decision by its full title, making public several of the facts for which Ms Hartmann was prosecuted–

a. the existence (and date) of one of the impugned decision;

b. the confidential character of that decision;

c. the identity of the moving party, Serbia-Montenegro.

100. On 12 May 2006, in *Milutinovic*, the Appeals Chamber publically mentioned the two impugned decisions in paragraphs 6, 33-35 and footnotes 7, 14,15,16,17,20,66,78 and 79, which contain verbatim citations/quotes from these decisions. These references relate to several of the facts relevant to these proceedings, including–

(i) the existence (and date) of the two impugned decisions;

(ii) the confidential character of these decisions;

(iii) the identity of the moving party/applicant;

(iv) That the impugned decisions relate to the production and protection of the records of the SDC;

(v) That national interest is the legal basis/argument sustaining the application;

[128] FTB,pars.25-33.

(vi) The legal meaning/interpretation given by the Appeals Chamber in one of the impugned decisions to the expression "interests";[129]

101. In decisions of 23 September 2004, the *Milosevic* Trial Chamber had made public most of the fact for which Ms Hartmann is being prosecuted.[130] The Chamber also made it clear through that decision that what is being prosecuted in such order is not the order itself or effect of the decision, but the material that is the subject of the protective measures.[131]

102. The records of this Tribunal contain many more examples of Chambers having referred publically to these decisions and some or all of the facts that are the subject of these proceedings.[132]

103. The practical effect of these decisions/orders was to lift the confidential status of the facts disclosed publically by the Tribunal. In other words, at least from the time of these decisions/orders, the facts in question could not be regarded as having been "treated as confidential" by the Tribunal. The *actus reus* of the crime of contempt under Rule 77(a)(ii) has not therefore been established. The TC erred when it found to the contrary.

104. To the extent that there was any doubt about what had been rendered public, the TC should have interpreted that doubt in favored of Ms Hartmann and erred when it failed to do so and failed to consider the reasonable possibility that Ms Hartmann might have been mistaken about that fact so as to prevent the formation of a culpable *mens rea*.[133] The failure of the TC to give Ms Hartmann the benefit of the doubt in these circumstances is compounded (and further illustrated) by the fact that the TC erred in law (and/or fact) when it failed to require the *amicus* to establish that the facts pleaded in the indictment as relevant to the charges had not been made public through *actus contrarius* of the Tribunal and, instead, put the onus on the Defence to establish

[129] See,par.35 and footnote 78-79.
[130] *Milosevic* Second Decision 23 September 2004;*Milosevic* First Decision 23 September 2004. These decisions make the following facts public: (i) the identity of the applicant; (ii) the existence of confidential orders pertaining to the SDC records; (iii) legal basis relied upon to order those measures.
[131] Ibid,in particular,p.2.
[132] E.g.*Delic* Decision 23 August 2006;*Delic* Decision 14 January 2008; *Perisic* Order 22 September 2006.
[133] Inparticular,Judgment,par.47.See,also,below.

the fact that facts in relation to which Ms Hartmann had been charged had been made public, instead of requiring the *amicus* Prosecutor to prove its contrary.[134] That applies to both the four facts and the new facts mentioned by the TC in par.33. It is not reasonable, in the circumstances, to assume (without evidence having been led to support such a conclusion) that the Tribunal did not waive the confidentially of some or all of the new facts. The logic applied by the AC – in a different context – makes it clear that where there is a sufficient evidential basis to sustain the Defence argument, the responsibility to rebut it is with the Prosecution.[135] That is because the responsibility to prosecute and prove his case is with the Prosecutor, not the Chambers.

105. The TC also erred in law, at paragraph 39, when drawing a distinction between "legal reasoning" and "applicable law" that (i) has no support in law, (ii) is contrary to the practice of this Tribunal, (iii) for which neither R77(a)(ii), nor international law provides a valid basis. In trying to draw an inexistent distinction in law, the TC sought to set aside/ignore the clear and overwhelming practice of this Tribunal of cases where a Chamber has publically disclosed the underlying legal reasoning/basis that was relevant to its findings although that legal reasoning/basis had originally formed part of a confidential decision (without the need/requirement of a specific application and/or formal order to do so).[136]

106. The TC erred in law and/or fact, in footnote 85, when suggesting that D24 and D62 could not constitute evidence of *actus contrarius* because they are posterior to the impugned decisions and erred further when disregarding their content insofar as was relevant to establishing what was "treated as confidential" by the Tribunal. They are relevant because they provide corroboration and support for the Defence's submission that the facts contained therein had been made public by the Tribunal and were regarded all through that time as not being "treated as confidential". They also provide support to impugn the TC's suggestion that only a formal decision lifting

[134] See, in particular, Judgment, par 38 (and pars 40 and 47).
[135] See *Hadzihasanovic* AJ,pars.146-148,151,153-155.
[136] See,in relation to the legal basis/reasoning pertaining to this case,FTB,pars.11-14,26-29,and references therein(*Milutinovic* Decision 12 May 2006,pars.34-35,footnotes 7,14,15,16,17,20,78, 79;*Milutinovic* Decision 15 May 2006,footnotes 12 and 42;*Delic* Decision 23 August 2006,p.4,footnote 10; *Delic* Decision 14 January 2008,p.3,footnote 8; *Perisic*, Order 22 September 2006,p.2,footnote 3; T.181-188;*Milutinovic* Prosecution Reply 10 April 2007,par.10 and footnote 9.See alsoD3,D11(FTB,par.14).

confidentiality following an application to that effect could legally be regarded as *waiver by the applicant.*[137]

107. The TC erred in law and/or fact when it failed to consider whether Ms Hartmann could reasonably have taken the view that, as a result of the Tribunal's public decisions, the facts that she discussed were not treated as confidential by the Tribunal anymore.[138] Doubts which existed as to the scope of permissible public disclosure (both in law and fact) and extensive public discussion of these matters clearly militated in favour of that conclusion. So did the fact (not addressed by the TC) that others had discussed these facts (including the legal basis/reasoning of these decisions[139]) without exposing themselves to contempt charges.[140] In the alternative, and to the extent that it considered this issue, the TC erred in law/fact and abused its discretion when concluding that such a conclusion was unreasonable in the circumstances.[141]

Conclusions

108. In light of the above, the AC should

(i) find that the TC has erred in law and/or fact,

(ii) find that each and all of these errors, individually or in combination, meet the relevant standard of review as neither the *actus reus* nor a culpable state of mind have been established, and

(iii) correct the TC's errors by applying the relevant legal standards and taking into account the relevant factors and (iv) find that each and all facts validly pleaded have been the subject of an *actus contrarius* so that the *actus reus* of Rule 77(a)(ii) crime could not be met and

(iv) should it consider the new facts as forming part of the charges, that there is a reasonable doubt (due to the failure of the TC/*amicus* to establish the contrary beyond reasonable doubt) that these facts might likewise have been rendered public by an *actus contrarius*.

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[137] See,below.
[138] FTB,pars.110-123,and references therein.
[139] FTB,pars.13-14; *Milutinovic* Prosecution Reply 10 April 2007,par.10 and footnote 9;D3,D11.
[140] E.g.D3,D4. Also D2;T.393-394.
[141] See,also,T.270-276,312,314-315,342;D11;P1.1,1002-1,4(-5)/10;P2.1,1003-2,8-9/13,1002-2,6-7/9.

V. ERRORS OF LAW/FACT REGARDING WAIVER BY THE APPLICANT

109. At par.46, whilst acknowledging the possibility, in law, of a waiver of confidentiality by the applicant, the TC suggested that, under the law of this Tribunal, a waiver by the party who applied for protective could only operate for the purpose of R77 where there has been a formal request to that effect by the applicant to the Tribunal and an "explicit" order of the Chamber in response lifting the confidentiality.[142]

110. The TC's position has no support in law, is contradicted by the Tribunal's practice and constitutes an error of law. It has resulted in a wrongful conviction of Ms Hartmann.

111. The Appeals Chamber made it clear that evidence of statements/comments officially acknowledged by officials whose Government had sought/obtained protective measures from the Tribunal and which disclose facts/information subject to the protective measures would justify regarding the confidential status of these facts/information as having been lifted.[143] In such a case, the interest which the applicant had sought to protect, and which the Tribunal could validly safeguard by using R77, has been waived by this waiver.[144]

112. No additional requirement of form has been set by the AC and neither the *Marijacic*, nor the *Jovic*, Appeals support the proposition advanced by the Chamber of a formal application and explicit order to have that effect.[145] Nor is there any support for such a proposition under international law, nor under any domestic legal system that the Defence could identify. In other words, the TC has made up a requirement that has no basis in law that led the TC to commit an error of law and fact.[146]

113. Relevant Tribunal practice makes it clear that no formal order is required to lift the confidentiality of a particular fact/information. This explains why there is no

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[142] Also,T.561.
[143] E.g. REDACTED
[144] FTB,pars.34-36.
[145] Judgment,FN.104.
[146] The *Margetic* TJ,par 49 to the extent that it refers to an "explicit" order (i) is obiter, (ii) cites no support/authority for its finding, (iii) does not suggest that "explicit" can or should be interpreted (as the TC did in the present case) as a formal order that grants a formal application for waiver of confidentiality.

precedent of a contempt conviction for disclosing facts/information that the applicant had himself/itself made public in the first place.[147] A conviction for contempt in such a case would not only be without a valid legal basis; it would also be oppressive, unnecessary and inappropriate.[148] There are many examples in the practice of this Tribunal (e.g.Dokmanovic,[149] Milosevic,[150] Obrenovic,[151] Galic,[152] Bala/Musliu,[153] Vasiljevic,[154] Prlic *et al*[155]) (and Taylor[156]) where the party that had sought and obtained a confidentiality order (the Prosecution) disclosed "confidential" information in advance of the order being lifted in relation to the protected information. In none of these cases did the Tribunal initiate contempt proceedings against the relevant Prosecution officials. Instead, the information in question was treated as public as soon as the applicant had made it public.

114. Practice from other international tribunals supports the view that no formal application and order is necessary to waive/lift such confidentiality. The question is whether there was, and remains, an interest worthy of protection in relation to the facts that are disclosed. For instance, in its Decision of 14 August 2009, in *Bemba*, the ICC said this:[157]

> "Even though the information related to this event remains confidential in the record of the case, the Single Judge considers that its revelation ex post does not prejudice the proceedings or the safety of Mr Jean- Pierre Bemba due to the fact that this event has already taken place."

115. The TC also erred in law and/or fact when finding, at par.45, that the information disclosed by representatives of Serbia-Montenegro was not the same information as the accused was charged with disclosing. First all four facts with which she was charged were in fact made public by representatives of Serbia-

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[147] E.g. D14,D15,D16,D18,D19;T.194-195;T.157-161.
[148] *DPP v Humphrys*,46.
[149] D14;*Dokmanovic* Order 3 April 1996;*Dokmanovic* Order 10 July 1996;*Dokmanovic* Order 3 April 1996.
[150] D15;D20;*Milosevic* Decision 24 May 1999.
[151] D16;*Obrenovic* Order 9 April 2001.
[152] D26,D27,D28.
[153] D18;*Limaj* Indictment 27 January 2003; *Limaj* Decision 18 February 2003.
[154] *Vasiljevic* Warrant 26 Oct 1998;*Vasiljevic* Decision 31 Oct 2000.
[155] D19;*Prlic* Order 2 April 2004; *Prlic* Order 5 April 2004; *Prlic* Order 4 March 2004.
156 D63,D64,D65.
[157] Decision on the Interim Release(ICC-01/05-01/08-475).

Montenegro.[158] For instance, Ms Kandic gave evidence that, at the latest from June 2007, Serbia-Montenegro had ceased to seek to protect the confidentiality of any of these facts for which Ms Hartmann now stands accused (and other facts).[159] This is supported by the record of these proceedings.[160]

116. Concerning the new facts of par.33, the record itself suggests that some of those were made public by representatives of Serbia-Montenegro.[161] It is clear for instance that representatives of Serbia-Montenegro made repeated public references to, for instance, the alleged basis and rational for the protective measures (and the purported effect of the AC's decisions).[162]

117 Furthermore, and in any case, the TC erred in law/fact (and violated Ms Hartmann's presumption of innocence) when failing to require the *amicus* Prosecutor to prove that this was not the case and requiring, instead, the Defence to establish that it was. As a result, it has not been established by the *amicus* that the new facts had not, in fact, been made public by the Applicant, Serbia-Montenegro, and there is positive evidence that these facts were or might have been made public by Serbia; e.g.:

- Whilst the Defence is unable to ascertain with any certainty what the TC's reference to "the content of closed session transcripts of the Applicant's submissions" and "confidential submissions" (par.33) relate to, there are clear indications of Serbia having made public what would appear to have been submissions before the Tribunal;[163]
- Whilst the Defence is unable to ascertain with any certainty what the TC's reference to the "legal reasoning" as opposed to "applicable law/legal basis" is intended to refer to, there are clear indications of Serbia having made public matters relevant to that fact;[164]
- As regard the "purported effect" (par.33) of the Decisions as understood by the Defence (namely, ("the subject, namely, the fact that protective measures

[158] D10;D5;D9; REDACTED; T.276-280,392,398-410;423-427,429,466-472,478-480,494-497. This acknowledgements were made by state officials acting in their official capacity:e.g.ibid.Also T.416-417;447-449,472-479.
[159] Ibid and T.400-402.
[160] Ibid;alsoT.423-427,429,466-472,478-480,494-497.
[161] See,e.g.,references in next paragraph.
[162] E.g.D10,par.58;D9,pp.25,33-34,37-38,41; D5,pp.4-5.
[163] See.e.g.D5;D1;D2;D10;D9,pp.33,37,93.
[164] E.g. D10,par.58;D9,pp.25,33-34,37-38,41;D5,pp.4-5;D1;D2;D6.

were granted in relation the records/minutes of Serbia-Montenegro's Supreme Defence Council ("SDC")"[165]), there were again clear indications that Serbia had made this fact public;[166]

Considering that the issue of waiver had been plainly identified by the Defence prior to trial as an issue relevant to this case,[167] it was the duty of the *amicus* to exclude the reasonable possibility that the confidentiality of each/all of these facts as might have covered them had not been waived by the applicant. He failed to do so in relation to any of the facts for which Ms Hartmann now stands convicted. In failing to put the *amicus* to that task and in failing to draw the necessary inferences from his failure to do so, and instead placing the onus on the Defence to prove the opposite, the TC erred in law/fact and abused its discretion and violated Ms Hartmann's presumption of innocence.[168]

118. The finding, at par.45, that the statements placed on the record do not "reflect the Applicant's official position before this Tribunal vis-à-vis the issue of confidentiality" is both an error of law and/or fact. An error of law because the TC adopted an incorrect legal test/standard. The AC has not required that, to amount to a waiver, the statement had to "reflect the Applicant's official position before this Tribunal vis-à-vis the issue of confidentiality". Nor is there support under international law for such a position. Instead, the AC took the view that the information publically disclosed only needed to be acknowledged by officials whose Government had sought and obtained protective measures from the Tribunal.[169] There is no requirement, in international law, that this position needs to relate specifically to the Applicant's "position before this Tribunal". What matters is that information subject to a confidential order was publically acknowledged by an official of the Applicant.

119. The TC also erred in fact because the record indicates beyond any doubt that the persons making these statements were acting/disclosing/acknowledging the relevant facts in their official capacity. The suggestion that the agents of Serbia-Montenegro appearing before the ICJ were not acting in their official capacity begs

[165] See above.
[166] E.g.D9;D10;D5;D1;D2;D6;T.389-390;404.
[167] E.g.Motion for Reconsideration,14 January 2009,pars.28-37;PTB,pars.27-33.
[168] See,inparticular,par.45.
[169]REDACTED

belief.[170] Furthermore the record of the Belgrade conference specifically states that these individuals were invited and expressed their views *in an official capacity*.[171] Ms Kandic, who organized and participated in that conference, also confirmed this fact.[172] And all of these elements also corroborate each other, a fact that the TC failed to account for. *At the very least*, these statements would create a reasonable doubt that the confidentiality of these facts had been waived by the Applicant.

120. None of the references given by the TC supports the view that Serbia-Montenegro sought to maintain the confidential nature of any of the facts that formed the basis of the charges against Ms Hartmann (the four facts or the new par.33 facts). Nor do any of them suggest that Serbian officials had a different position than the one identified by the Defence *in relation to any of these facts*. As is clear from the record, what Serbia-Montenegro sought to keep confidential is the actual contents of the SDC minutes.[173] Ms Hartmann was not charged with disclosing this.[174] Furthermore, the Defence conceded at trial that Serbia-Montenegro might continue to seek to protect the contents of those minutes so that the confidentiality of these documents could not be said to have been waived by Serbia-Montenegro. In that sense, none of the statements identified by the TC contradict the necessary conclusion, as supported in evidence, that Serbian officials had waived the confidential character of the facts in relation to which Ms Hartmann had been charged and prosecuted. There is simply no support for the finding that Serbian officials "pursued the opposite approach" in relation to any of the facts that form the basis of Ms Hartmann's conviction. If there was any doubt in that regard the TC should have interpreted them in favour of the accused. For all these reasons, the TC erred in law/fact.

121. The Trial Chamber erred in law and/or fact when it failed to consider whether Ms Hartmann could reasonably have taken the view that, as a result of the Applicant's public statements, the confidentiality of facts that she discussed had been waived.[175] In the alternative, and to the extent that it considered this issue, the Trial Chamber erred in law and/or fact when concluding that such a conclusion was unreasonable in the circumstances.

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[170] See,D10;D42; REDACTED.
[171] D.9,pp.16,33,39,84,93,94,102;T.416-417;447-449,472-479.
[172] See e.g.T.416-417;447-449,472-479.
[173] D10,pars.55-59;D9,pp.33,36-37,41,92-93;D5.
[174] Judgment,par.35.
[175] See,below;FTB,pars.87-96,110-123(referring,*inter alia*,P2.1,1004-2,6/21;P2.1,1003-2,5/13;P1.1 1002-1,3-4/10;P4;T.144-146,311,492-494).

Conclusions

122. In light of the above, the AC should

(i) find that the TC has erred in law and/or fact,

(ii) find that each and all of these errors, individually or in combination, meet the relevant standard of review since, as a result of those errors, neither the requisite *actus reus* nor a culpable *mens rea* had been formed nor established beyond reasonable doubt, and

(iii) correct the TC's errors by applying the relevant legal standards and taking into account the relevant factors and

(iv) find that each and all facts validly pleaded have been the subject of a waiver on the part of the applicant so that the disclosure of these facts thereafter could not constitute the *actus reus* of an offence pursuant to R77(a)(ii).

VI. ERRORS OF LAW/FACT AND SERIOUSNESS OF THE ALLEGED CONDUCT

TC's errors

123. The TC erred in law and/or fact when it found, at par.25, that "any" knowing and willful violation of an order which interferes with the administration of justice, regardless of the seriousness of that interference, would necessarily amount to a criminal offence for the purpose of R77(a)(ii) and that issues of seriousness are to be addressed in the context of sentencing only.

124. This finding has no support in international and is contrary to the law and practice of this Tribunal. There is no international law that would support the criminalisation of knowing/willful interference with the administration of justice regardless of the gravity of that interference. The practice of this Tribunal is littered with examples of counsel (for Prosecution or Defence) or the Registry knowingly and, arguably willfully, disclosing information in breach of court orders who are not being charged with contempt, because their conduct does not rise to the level of seriousness that would justify criminal proceedings.[176] During the proceedings, the *amicus*

[176] E.g. REDACTED T.153 *et.sq.*

himself has on several occasions knowing and willfully disclosed information publically that he knew were covered by confidential orders and which he later sought to repair.[177] No R77(a)(ii) were brought against him, nor was there any suggestion that he had committed contempt.

125. The TC not only neglected the practice of this Tribunal, but it also ignored its laws. In its FTB, the Defence had put forth a number of relevant precedents on that point, none of which the TC even acknowledged nor discussed. First, the AC has said that it would not criminalise conduct that is merely negligent in nature.[178] The TC did not take notice of that fact and erred in law/fact when it failed to determine if/whether the conduct of Ms Hartmann had been more than negligent. And if it did (without mentioning it), it would have erred and abused its discretion in excluding it as a reasonable possibility.[179]

126. It also erred in law/fact when failing to consider that the *actus reus* of the offence would not be fulfilled unless the conduct in question reached a sufficient level of gravity. Furthermore, in *Ntakirutimana*, for instance, the ICTR found that the disclosure in violation of the witness protection order was not sufficiently serious to be tantamount to contempt, thereby making it clear that the disclosure even if knowing and willful is not enough to warrant a criminal conviction.[180] In *Furundzija*, the Tribunal likewise took the view that a pattern of violations of court's order by the Prosecution was not sufficiently serious to amount to a crime of contempt since only the most serious interferences with the administration of justice were intended to be prosecuted under that heading.[181] In *Brdjanin*, the Trial Chamber found that one of the counts of contempt raised against Ms Maglov did not meet that threshold as the information which she was said to have disclosed in violation of a court order related to disclosure of a fact that was already publically known.[182] In *Kajelijeli*, despite finding that the Prosecutor had intentionally violated a witness protection order, the ICTR did not find counsel guilty of contempt, but excluded the evidence obtained in

[177] Defence Reply 21 January 2009;Prosecution Notice 26 January 2009; Response to *Amicus* Second Submission,2 July 2009;T.178,T.228.
[178] *Nobilo* AC.
[179] See,in particular,FTB,pars.77,87,97.
[180] *Ntakirutimana* Decision 16 July 2001,pars.10-12.
[181] *Furundzija* TC's Complaint 5 June 1998,par.11.
[182] *Maglov* Decision on Acquittal,pars.9-10 (in relation to count 3).

violation of that order.[183] Furthermore, as noted above, a whole range of "technical", "formal" or "negligent" violations of court orders have been left out of the scope of Rule 77.[184]

127. The TC erred in law/fact when disregarding this line of precedents and the Tribunals' practice (as was relevant to establishing the scope of Rule 77) and failing to address the issue of the sufficient gravity/seriousness of Ms Hartmann's conduct for the purpose of determining whether the conduct attributed to Ms Hartmann fulfilled the *actus reus* relevant to R77(a)(ii).

128. This error is supplemented by its failure to require the *amicus* to prove that fact and, having failed to do so, a failure on the part of the TC to take notice of that failure and to acquit Ms Hartmann on that basis.

129. The TC also erred in law/fact as it failed to consider each and all of the factors on the record pertaining to this issue.[185] It is also evidence of its principal error discussed above.

Conclusion

130. In light of the above, the AC should

(i) find that the TC erred in law/fact;

(ii) find that these errors, individually or in combination, meet the requisite standard of review as they caused the TC to fail to establish that the conduct of Ms Hartmann was such as to be serious enough to (a) be more than negligent and (b) meet the seriousness threshold relevant to R77(a)(ii);

(iii) apply the correct legal standard and take into consideration the relevant factors;

(iv) take notice of the fact that there is no finding of an actual interference with the administration of justice; and

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[183] *Kajelijeli* Decision 15 Nov 2002,pars.14-15.

[184] E.g. for a violation by the Registry, REDACTED. See also, for legal authority, *AG v Newspaper Publishing plc and Others.*

[185] See,inparticular,FTB.pars.151-166.

(v) overturn the TC's finding and find that the conduct of Ms Hartmann was not such as to be serious enough to be criminalized under R77(a)(ii).

VII. ERRORS REGARDING THE REQUIREMENT OF A "REAL RISK" TO THE ADMINISTRATION OF JUSTICE

Background

131. It should be noted, at the outset, that it was the position of the *amicus* all through these proceedings that he was not required to establish, as part of the *actus reus*, that the conduct created a "real risk" to the administration of justice. It was his constant position that a knowing violation of a court order was *per se*, and necessarily, be sufficient to meet the standard of R77(a)(ii).[186]

132. As with other parts of this case, the TC made a case against Ms Hartmann that the *amicus* had not sought to pursue nor establish.

Impugned findings

133. In par.27, the TC indicates that the requirement of a "real risk" is dealt with in Sections VI.D (Freedom of expression) and VII.B (Gravity of the offence).

134. In footnote 57, the TC says that arguments pertaining to this requirement are more properly disposed as one of jurisdiction and that it is therefore unnecessary to deal with them as an issue pertaining to *actus reus*.

135. At par.74, the TC held that Ms Hartmann had created a real risk of interference with the Tribunal's ability to exercise its jurisdiction to prosecute and punish serious violations of IHL. It then identifies the "real risk" in the following terms (emphasis added):

> "The disclosure of protected information in direct contravention of a judicial order serves to undermine international confidence in the Tribunal's ability to guarantee the confidentiality of certain information and <u>may</u> deter the level of cooperation that is vital to the administration of international criminal justice."

[186] *Amicus*PTB,pars.13.et.seq;*Amicus*FTB,pars.11-13.

136. At par.80, the TC declared that Ms Hartmann's conduct had –

> "created a real risk that states may not be as forthcoming in their cooperation with the Tribunal"

and added that–

> "This in turn necessarily impacts upon the Tribunal's ability to exercise jurisdiction to prosecute and punish violations of [IHL]" (emphasis added)

TC's errors

137. The TC's reasoning regarding this requirement is filled with errors. It has no basis in international law[187], is contrary to the law of the AC and has resulted in the impermissible curtailment of several fundamental rights in violation of the Statute/international law.

TC's failure to address the issue as part of the actus reus and incorrect legal test adopted to assess existence of a "real risk" to the administration of justice

138. The Tribunal's "contempt" jurisdiction is not general in nature. It is an enabler of its principal jurisdiction. This explains that the Tribunal's contempt jurisdiction is dependent on proof having been made that the conduct of the accused created a real risk for the administration of justice.[188] Unless such a risk exists, the Tribunal has no jurisdiction under Rule 77.

139. The jurisprudence of this Tribunal has made it clear that whilst the Prosecutor need not prove an *actual* interference with the administration of justice, proof must be made, as part of the *actus reus*, that the impugned conduct created a real risk for the administration of justice.[189] This conforms to relevant domestic practice which forms

[187] *Nobilo* AJ,par.30;*Vujin* AJ,pars.13,24.
[188] E.g. *Margetic* TJ,par.15;*Marijacic* TJ,par.50.
[189] See *Vujin* AJ,par.18;*Nobilo* AJ,par.36; *Margetic* TJ,par.15;*Marijacic* TJ,par.50

the backbone of general principles of international law that are applicable in this context.[190]

140. The TC erred in law and/or fact when (i) suggesting that the matter was not jurisdictional (as an element of the offence, it was), (ii) failing to address that requirement as such, (iii) failing to acknowledge that it forms part of the offence's *actus reus* and dealing with it as such and (iv) failing to take notice of the fact that the *amicus* had failed to prove (and seek to prove) that this was a requirement to be proved at trial.[191]

141. Contrary to the AC's injunction,[192] the TC made new law for Ms Hartmann by diluting the requirements of this offence below the standard that was recognized under international and/or in violation of the principle of legality by resolving a doubt in Ms Hartmann's disfavour. In so doing, it also breached the Tribunal's jurisdictional boundaries.

142. First, the jurisprudence of this Tribunal is clear that such an element forms part of R77(a)(ii)'s *actus reus*.[193] The TC's failure to acknowledge that fact was an error of law.[194]

143. Secondly, the TC erred in law when suggesting that conduct that "may" render state cooperation less forthcoming "necessarily" interferes with the administration of justice and thus was sufficient to meet the requirements of international law and R77(a)(ii).[195] This was an error of law. There is no support for such a position under international law, as form the necessary basis/grounding of crimes for R77.[196] Unsurprisingly, the TC put forward no authority for either parts of its proposition, nor garnered support for a suggestion that such a rule/principle forms part of existing international law.

144. Thirdly, that standard falls short and violates the binding jurisprudence of the AC. The AC has repeatedly made clear that the "risk standard" was higher than the artificial "may" standard adopted by the TC. In *Nobilo* and *Vujin*, the AC stated that,

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[190] E.g. *Duffy, ex p Nash*,p.896(UK);*Glennon*,at 605(Australia);*Birdges v California*,at 263(USA);*Dagenais v CBC*(Canada);*Mahon v Post Publications*,par.92(Ireland); *Midi Television (Pty) Ltd v Director of Public Prosecution (Western cape)*(South Africa).
[191] Judgment,par.27 and footnote 57.
[192] *Nobilo* AJ,par.30;*Vujin* AJ,pars.13,24.
[193] E.g. *Margetic* TJ,par.15;*Marijacic* TJ,par.50. See also, below, *Vujin* AJ,par.18;*Nobilo* AJ,par.36.
[194] See,above.
[195] Pars.74,80.
[196] *Nobilo* AJ,par.30;*Vujin* AJ,pars.13,24.

as a matter of international law and for the purpose of this Tribunal, only conduct "**which tends to**" obstruct, prejudice or abuse its administration of justice would meet the requisite standard under R77.[197] The TC took no apparent notice of that binding caselaw. What the AC stressed is that only an *actual*, not a *potential*, risk to the administration of justice would be sufficient to criminalise conduct under that Rule and only if it was serious enough as to "tend to" obstruct, prejudice or abuse the administration of justice.

145. The AC standard is consistent with relevant domestic practice.[198] As noted by Lord Coulsfield, it is

> "difficult to see how it can be suggested that there is such a risk unless the prejudice can be pointed to in some reasonably specific way".[199]

This is also because "[t]he administration of justice has to be robust enough to withstand criticism and misunderstanding".[200] In *In re Lonrho plc*, Lord Bridge said (p 209,emphasis added):

> "Whether the course of justice in particular proceedings will be impeded or prejudiced by a publication must depend primarily on whether the publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would otherwise have followed. The influence may affect the conduct of witnesses, the parties or the court."

146. In the US, the Supreme Court held that

> "the likelihood, however great that a substantive evil will result [to the administration of justice] cannot alone justify a restriction up

[197] *Vujin* AJ,par.18;*Nobilo* AJ,par.36.
[198] see above, footnote 189
[199] Ibid.
[200] *Megrahi v Times Newspapers Limited.*

> on freedom of speech or the press. The evil itself must be 'substantial.'"[201]

> "[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[202]

The same Court explained that the risk to the administration of justice-

> "must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil."[203]

147. The TC erred and violated binding law when adopting and applying a lesser, lower, standard than that required by international law to convict Ms Hartmann. As a result, her conviction is unsafe. As discussed next, there simply was no evidence to sustain a finding that her conduct had created a "real risk" for the administration of justice, as correctly defined by the AC.

No jurisdiction after the end of proceedings

148. As already noted, the Tribunal only has jurisdiction over contemptuous conduct to the extent that its definition of it is consistent with existing international law.[204] There is no general principle common to all legal systems as would permit a tribunal to prosecute for contempt a person for disclosing facts pertaining to judicial proceedings *after* these proceedings have closed/come to an end. Nor, therefore, does the Tribunal have jurisdiction to punish such crimes pursuant to R77 as it would breach both the limits set by the Security Council and those developed by the Judges in the form of R77.

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[201] *Bridges v. State of Cal.*at262.
[202] *Id.*at 263.
[203] *Craig v. Harney*,331 U.S.367,376(1947).
[204] *Nobilo* AJ,par.30;*Vujin* AJ,pars.13,24.

149. *Subject arguably to the protection of victims/witnesses under Article 22 Statute*,[205] the Tribunal has no jurisdiction to prosecute contempt in relation to conduct that has occurred after the proceedings to which the disclosure relates have ended. The TC has not pointed to a general principle of international law that would provide for a broader jurisdictional reach. Under existing international law the curtailment of freedom of expression in the context of criminal proceedings knows of only two exceptions: where the fair trial of an accused or his right to be presumed innocent are at stake.[206] This explains that in those jurisdictions that have inspired the law of contempt of this Tribunal, the test of a "real risk of prejudice to the administration of justice" has since the ECHR-era "always been used in relation to [particular proceedings], not in relation to the administration of justice generally".[207] As noted by Mr Joinet, an international authority on the subject and a former top French magistrate,[208]

> "[w]hen the case is over, there is no problem regarding the administration of justice."[209]

150. This explains that, aside from Ms Hartmann's case, all contempt proceedings pertained to disclosure of information that could have interfered with existing and pending (trial or appeal) proceedings. This was not the case here since proceedings in the *Milosevic* case to which this case pertains had been terminated by an order of 14 March 2006.[210]

151. In those circumstances, the exercise of the Tribunal's Rule 77 jurisdiction by the TC over the conduct of Ms Hartmann was *ultra vires* of statutory and international law limitations. The TC, therefore, erred in law when

(i) failing to address/acknowledge/account for Defence arguments/submissions on that point,

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[205] Arguably, the Tribunal could have contempt jurisdiction even after the end of proceedings where the protection of victims/witnesses is at stake because the Statute provides for a specific statutory basis (Article 22) for the protection of victims/witnesses. No such basis exists in relation to any other protected interest. The jurisdiction of the relevant states would be competent in such cases.

[206] T.346-348;D39.

[207] See Fenwick/Phillipson,*Media Freedom under the Human Rights Act*,p.288.

[208] The *amicus* conceded that he was an authority on the subject:e.g.T.246,256.

[209] T.311.

210 *Milosevic* Order 14 March 2006;T.375-376.

(ii) disregarding international law and

(iii) criminalizing conduct beyond the scope of the Tribunal's jurisdictional reach.

TC's erroneous finding that a "real risk" to the administration of justice existed

152. At pars.74 and 80, the TC found that Ms Hartmann's conduct had created a "real risk" that states would lessen their cooperation which in turn "necessarily" impacts upon the Tribunal's ability to exercise its primary jurisdiction.

153. To make those findings, the TC did could not point to a single piece of evidence on the record that would suggest that Ms Hartmann's conduct had had such an effect. In other words, and in addition to being based on the wrong legal threshold,[211] it is based on no evidence that can be identified on the record/Judgment. And indeed, there is none to support either findings.

154. Instead, the record is replete with indications that-

(i) no such risk existed, that,

(ii) rather than decrease, Serbia's cooperation with the Tribunal increased/improved after Ms Hartmann's publication.

The TC considered none of the many indications contradicting its findings or abused its discretion when disregarding them and, therefore, erred.[212] It erred and abused its discretion further when finding that such a risk existed despite the absence of evidence to support such findings, and despite clear evidence to the contrary. The following should be pointed to:

(i) The disclosure attributed to Ms Hartmann has had no demonstrated effect on the proceedings or the administration of justice;

(ii) Evidence was recorded that no real or substantial risk had been created by **her** conduct;[213]

(iii) Serbia-Montenegro never suggested that its interests had been interfered with as a result of Ms Hartmann's publications or that it would cease/lessen its cooperation with the Tribunal as a result.[214] Also relevant in that regard is that, to the extent that this was the *amicus* case, he failed

[211] See above.
[212] FTB,pars.67-70.
[213] T.452-460,481-483.
[214] T.389;404;D9.

to call any evidence on that point. The necessary inference should be drawn from that failure.

(iv) Instead, the evidence is that, after the publication of Ms Hartmann's book, Serbia's cooperation with the Tribunal in fact improved;[215]

(v) The *Milosevic* proceedings had been terminated;[216]

(vi) These issues were already in the public domain and were widely commented upon;[217]

(vii) Ms Hartmann disclosed none of the contents of the documents that were subject to the protective measures.[218]

(viii) Ms Hartmann acted in good faith and based on an accurate factual basis.[219]

155. The supplementary finding that the alleged risk that states may decrease cooperation "necessarily" means that the administration of justice will be interfered with is equally flawed. It is flawed as a matter of law since Article 29 sets an absolute and unqualified duty/obligation to cooperate that leaves no room for a choice/discretion to do so. It is flawed as a matter of evidence since there is (i) no evidence to sustain that finding (let alone at the beyond reasonable doubt standard) and (ii) clear, un-disputed, evidence to the contrary, namely, that in fact, Serbia's cooperation with the Tribunal has improved so that even if one accepts that her conduct "may" have created a risk to state cooperation, there is no "necessary" linkage between that risk and an interference with the administration of justice.[220]

156. In sum, the TC erred in law/fact when

(i) making an erroneous determination as to what would constitute a "real risk" for the purpose of R77(a)(ii),

(ii) when determining what legal standard was applicable to establishing that fact,

(iii) and/or misapplying that test and/or in abusing its discretion in that regard, and

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[215] T.452-460;481-483.
[216] See above.
[217] FTB,pars.43-52.
[218] Also,Judgment,par.35.
[219] T.145. See *Rizos*,par.45;*Dupuis*,par 46;*Fressoz*, pars.54-55. T 145, 270, 384-387;Defence Motion pursuant to Rule65*ter*,7 February 2009,Annex.
[220] T.452-460;481-483

(iv) finding that such a risk had been established beyond reasonable doubt.

Alleged "real risk" and freedom of expression

157. The TC erred in law and/or fact when it took the view that, as a matter of international law, a mere supposed "risk" to the administration of justice would be such as to warrant/permit the curtailment of Ms Hartmann's freedom of expression through a criminal conviction.[221]

158. As a matter of international law, and where the safety of victims/witnesses is not at stake, freedom of expression may only be curtailed in the context of criminal proceedings where (i) the fair trial of an accused or (ii) his right to be presumed innocent are at stake.[222] There is no support under international law as would allow an abstract risk to the administration of justice generally to curtail the fundamental right to freedom of expression. This also explains that in ECHR-countries such a risk can only be said to exist in relation to particularly proceedings, not the administration of justice in general.[223]

159. This is also why the ECHR requires that reasons for an interference with one of the legitimate aims of curtailment be "relevant and sufficient".[224] This test requires analysis of the nature, severity and effects of obstructing measures in tandem with any expected harm caused to fundamental rights.[225] The reference work on this matter says the following:[226]

> "the chilling effect doctrine comes into operation in this context, with the Court [ECHR] emphasizing the importance that obstructing measures must not have any deterrent effect on the exercise of the rights by the general public. However, reliance on this doctrine in the case law is limited to cases concerning freedom

[221] The matter is also the subject of an appeal in the context of the Trial Chamber's erroneous interpretation of the nature and scope of Ms Hartmann's freedom of expression and its relevance to the present matter.
[222] T.346-348;D39.
[223] Again,e.g.,Fenwick and Phillipson,p.288.
[224] *Dupuis*,par.36-38;*Spycatcher1*,par.62;*Handyside v.UK*,pars.48-50;*Wemhoff*,par.12;*Neumeister*,par.5;*Stögmüller*,par.3;*Matznetter*,par.3.
[225] Van Dijk et al.,*Theory and Practice of the ECHR* (4th ed),at341 and references cited(e.g.*Ceylan*,par.37;*Busuioc*,par.95).
[226] Ibid,at.342(footnote omitted).Also,*Castells*,par.46;*Goodwin*,par.39;*Selisto*,par.53;*Rizos*,par.42.Also, *Brdjanin* Decision 7 June 2002, par.30;T 252

> of expression and freedom of association. Applied under Article 10 [freedom of expression], this doctrine means that journalists, press or the public in general should not be discouraged from criticizing public authorities by the threat of criminal or civil proceedings for defamation. In view of the 'dominant position' that it occupies, a Government must display restraint in sanctions against freedom of expression and show prudence in choosing the measure of a less restrictive kind."

The TC erred in law (and violated both Ms Hartmann's rights and the Tribunal's jurisdiction) when failing to identify/acknowledge these principles/considerations and erred in fact when it failed to apply them to the evaluation of the evidence and/or the propriety/legality of the means (a criminal conviction) chosen to sanction Ms Hartmann.

160. International law does not allow for the curtailment of freedom of expression based on an abstract, hypothetical, possibility of an interference with the administration of justice.[227] This has no basis in international law and the TC erred when suggesting otherwise whilst providing no support for its finding. In addition, and in the alternative, the TC abused its discretion when making that finding.

Miscellaneous errors

161. The Trial Chamber also erred in law and/or in fact by "double-counting" the alleged "real risk"

(i) as a basis for curtailment of Ms Hartmann's freedom of expression and

(ii) as an aggravating factor.[228]

162. At par.80, the TC suggests that public confidence could suffer from violations of Court order. It is unclear whether the TC has found that Ms Hartmann's conduct had such an impact. If it made such a finding, this would constitute an error of fact as

[227] Above.
[228] Judgment,pars.74,80.

there is not a shred of evidence that public confidence in the Tribunal was in any way diminished by Ms Hartmann's conduct, nor was evidence led to prove such a fact.[229]

Conclusions

163. In light of the above, the AC should

(i) find that the TC erred in law/fact;

(ii) find that these errors, individually or in combination, meet the requisite standard of review as they caused the TC to fail to consider and to establish one of the elements of the offence relevant to R77(a)(ii) and by criminalizing conduct in breach of relevant international standards/principles;

(iii) apply the correct legal standard and take into consideration the relevant factors;

(iv) take notice of the fact that there clear and sufficient evidence that no real risk to the administration of justice (as properly defined) has been established; and

(v) overturn the TC's finding and enter a not guilty verdict.

VIII. ERRORS AS REGARD MS HARTMANN'S *MENS REA* – GENERAL GROUNDS

TC's errors regarding "intent to interfere with the administration of justice"

164. The TC erred in law/fact when taking the view that a crime under R77(a)(ii) did not require proof of an intent to interfere with the administration of justice and suggesting that "any" knowing and willful violation of an order meets the requisite *mens rea* requirement.[230] This-

(i) Constitutes a violation of the law of the tribunal,

(ii) Has no basis in existing international law,

(iii) Violated the principle of legality.

[229] The evidence of Mr Vincent cited at par.80 to the extent that it was relevant at all to the issue was general in nature and did not purport to apply in any way to the conduct of Ms Hartmann.

[230] Judgment,pars.53(54-55,62).

The TC erred further, in law/fact, when it failed to require the Prosecutor who bore the burden of proof, to prove that element and erred in law/fact when it failed to come to the reasonable conclusion that no such intent existed. Also, and to the extent that the TC considered, at par.53, that there were doubts as regard the state of the law, it erred by failing to apply the principle *in dubio pro reo* and to interpret the law in favour of the accused, thereby violating the principle of legality.

165. The jurisprudence of the Tribunal clearly requires that proof be made of the existence of such an intent. There must be proof of a

> "specific intent to interfere with the administration of justice".[231]

Thus, the

> "*mens rea* of contempt is the knowledge and the will to interfere with administration of justice."[232]

In other words, to be contemptuous under that provision, the conduct must have been

> "calculated to prejudice the proper trial of a cause".[233]

Or, as the ICTR has put it, there must be

> "an intention to commit the crime of contempt".[234]

166. This element of intent comes *in addition to* the requirement of knowledge –or willful blindness– of the existence of a confidential order:

> "the Prosecution must [...] establish that the accused had the specific intent to interfere with the Tribunal's due administration of justice".[235]

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[231] *Beqaj* TJ,par.22.
[232] *Margetic* TJ,pars.30 and 77(emphasis added).
[233] E.g.*Hunt v Clarke*,per Lord Cotton.
[234] *Kanyabashi*, Decision 30 November 2001; *Kajelijeli*, Decision 15 November 2002,par 9.
[235] *Maglov* Decision on Acquittal,pars.15/40(and14,23).Also SCSL-*Brima* Contempt Trial Judgment,pars.18-19.

Therefore, for each form of criminal contempt, the Prosecution would have to establish that the accused acted–

> "with specific intent to interfere with the Tribunal's due administration of justice".[236]

167. The TC only referred to the *Beqaj* and *Maglov* holdings and dismissed them as *passé* law, as having been "developed" by subsequent AC rulings. Not so as this would have been a serious violation on the part of the AC with the principle of legality and the requirement that the scope of R77 be consistent with existing international law. None of the AC judgments cited by the TC suggest that no requirement of "intent" is required under R77(a)(ii) and it erred when relying on them for that proposition. In *Jovic* and *Marijacic*, the authorities cited by the TC, for this alleged jurisprudential "development", no issues were raised as to the need or otherwise of an intent to interfere with the administration of justice. Instead, findings pertained to a suggestion that as part of the *actus reus*, proof had to be made of "harm" or actual prejudice caused to the administration of justice to constitute contempt, a submission not advanced by the Defence of Ms Hartmann.[237]

168. The TC also erred in law/fact by relying (at par.53) upon the *Bulatovic* TC Decision, which pertained, not to R77(a)(ii), but to R77(a)(i), and assuming (without verifying and establishing) that the same *mens rea* would apply to different sorts of contemptuous crimes. Furthermore, and contrary to the present case and the precedents cited in support of the present case, the *Bulatovic* contempt was committed "in the face of the court". It is common to most common law jurisdictions to have different legal requirements, including in some cases regarding *mens rea*, between "out of court" and "in the face of the court" contempt.[238] Thus, whilst the *Bulatovic* TC was right not to rely on the *Aleksovski* precedent,[239] the TC was wrong to rely on *Bulatovic*.[240] The assumption that the same *mens rea* would apply to different forms of contemptuous crimes and that the requirement of *mens rea* would be identical in the case of "in the face of the court" contempt and "out of

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[236] *Maglov* Decision on Acquittal,pars.15/40(and14, 23);*Milosevic* Decision 13 May 2005, par.11.
[237] See *Jovic* AJ,par.30,referring to *Marijacic* AC,par.44.See FTB,par.86.
[238] E.g.C.J. Miller,*Contempt of Court*,(3rd.ed),in particular,pars.4.1et.seq.
[239] *Bulatovic* TJ,par.17.
[240] Judgment,par.53.

court" contempt is not one that is ground in general principles. It is flawed and an error of law.

169. By contrast, in *Nobilo*, a binding AC precedent pertaining to "out of court" contempt, which the TC failed to notice, the AC had said that an accused could only be convicted under Rule 77 where he has been shown to have acted

> "with specific intention of frustrating [the] effect [of confidential orders]".[241]

170. The requirement that proof be made of an intent to interfere with the administration of justice is not just the reflection of the state of the law of this Tribunal, but also a reflection of the general principles of law that must sustain the Tribunal's Rule 77.[242] In *Maglov*, the TC cited many authorities/cases from domestic practice/jurisdictions supporting that requirement of intent.[243] Many others exist.[244] A general principle that would criminalise conduct regardless of or despite the absence of such an intent could simply not be established as a matter of international law.

171. In those circumstances, the TC erroneously concluded that there existed under the general principals of international law a definition of the crime of contempt of the sort provided for in R77(a)(ii) that did not require an intent to interfere with the administration of justice (and/or failed to establish one). By adopting a different/looser interpretation, it erred in law, violated the jurisprudence of this Tribunal and went beyond the permitted scope of international law.

172. The TC also erred in law and/or fact when convicting Ms Hartmann despite the Prosecutor's failure to establish such an intent and despite the absence of evidence that she had intended to interfere with the administration of justice (and despite evidence to the contrary). The *amicus* did not make it a part of his case to prove an

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[241] *Nobilo* AJ,par.40(c).
[242] *Nobilo* AJ,par.30;*Vujin* AJ,pars.13,24.
[243] See *Maglov* Decision on Acquittal,FN.22,27,40.
[244] E.g., *ex parte Bread Manufacturers ltd, Re Truth & Sportman Ltd;Hinch v Attorney-General*(Australia); *A-G v Times Newspapers; AG v.Newspaper Publishing PLC*,[1988]Ch.333,374-375,381-383,387,perSir John Donaldson, Lloyd LJ and Balcombe LJ;*AG v News Group Newspapers PLC*,[1989]QB 110,126(Watkins LJ);*Connoly v Dale* [1996] QB 120, at 125-126 and 229 (Balcombe LJ) (UK); *State v Van Niekert*(South Africa);*US v.Ortlieb*,274 F.3d 871, 874 (5th Cir. 2001);*US v. United Mine Workers of America*, 330 U.S. 258,303;*American Airlines, Inc. v. Allied Pilots Ass'n*,968 F.2d 523,532 (USA).

intent to interfere with the administration of justice taking the position, instead (like the TC), that any knowing and willful violation of a court order would per meet the necessary *mens rea* element.[245] There is, therefore, no evidence that Ms Hartmann acted with such intent. Instead, and as outlined in the Defence FTB, there is plenty to the contrary.[246] The record contains, for instance, an unchallenged statement by Ms Hartmann:

> "I formally reject having ever knowingly violated any regulations and affirm that I never knowingly or willingly endeavored to hamper the course of justice, in any way."[247]

Ms Hartmann then added:

> "I never interfered with justice. I never saw these statements. I never impeded justice from being done. I made my contribution long before I was at the Tribunal, and while I was there, and I will continue to make my contribution in the future."[248]

This evidence has not been rebutted, is corroborated and taken together would exclude as unreasonable any finding that Ms Hartmann intended to interfere with the administration of justice.[249] The TC erred in law and/or fact by failing to take into account (or give due weight to) all the evidence that demonstrated that Ms Hartmann did not have the intent to interfere with the administration of justice and erred when not taking account of the fact that this requirement did not even form part of the Prosecution's case.

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[245] E.g.*Amicus* PTB,pars.22-24
[246] FTB,pars.87-96.See e.g. *Ruxton Statement*,p.4; T.137;144-146;384-387;492-494; P1.1,1002-1,3-4/10;P2.1,1003-2,2/13.
[247] P1.1,1002-1,4/10.Also, P2.1,1003-2,2/13.
[248] P.1.1,1004-2,16/21;FTB,par.16.
[249] FTB,pars.79-96(including, See.e.g.T.137,144-146,271-276,281-282,311,314-315,340-341,372-374,384-404, 423-443,487-494;D5;D1;D2;D3;D46;D4;D6;D9;D36;D47;P2.1,1002-2,1-2,4-7/9;P2.1,1003-2,2,7/13;P1.1,1002-1, 3-7/10;P2.1,1002-2,1, 6-7/9;1003-2,2,5-10/13;1004-2, 6,9-11/21;P2.1,1004-2,7,11/21;*Ruxton* Statement).

173. Finally, the *obiter*[250] suggestion of the TC, at par.53, that proof of either actual knowledge or willful blindness of the existence of an order, or reckless indifference to the consequences of the act by which the order is violated automatically means that an intent to interfere with the administration has been established has (i) no support in international law and (ii) no basis in the evidence.

TC's errors regarding alleged knowledge of confidentiality of facts disclosed

174. At par.58, the TC suggested that the "strongest evidence" of Ms Hartmann's *mens rea* (which the TC took to mean a knowing and willful violation of a court order[251]) was Ms Hartmann's knowledge of the confidentiality of the two impugned AC decisions. At par.57, the TC added that the fact that Ms Hartmann had not seen these decisions at the time of publication was "of no consequence to this case".

175. The TC erred in law/fact and/or abused its discretion when making these findings. Ms Hartmann knew of the existence of two decisions and knew that they had originally been filed confidentially. She knew this as these facts had been made public by the Tribunal itself, by the Applicant and in the public/media.[252] The TC erroneously equated

(i) a knowledge of the fact that these decisions had been originally filed confidentially with

(ii) the knowledge that the facts disclosed in the book/article continued to be treated as confidential at the time of publication despite public discussion of these facts

(iii) and Ms Hartmann willfully disclosed those with that knowledge.

The TC erred by assuming proof of one fact from another. More, it erred by being satisfied that the *mens rea* had been established based on proof indications that fell short of the requisite standard. First, as noted above, there was no proof of intent on her part and clear evidence to the contrary. Secondly, the TC erred when failing to identify any evidence that Ms Hartmann had "willfully" disclosed evidence that she knew to be treated as confidential. Even by the TC's own standard, knowledge itself

[250] Judgment,par.55.
[251] Judgment,pars.53,62.
[252] E.g.P1.1,1002-1,4(-5)/10;P2.1,1003-2,8-9/13,1002-2,2,4-5,6-7/9;P.3.1(p.122).FTB,pars.71-73,88.

would not suffice. And there was un-rebutted evidence that Ms Hartmann did not willingly disclose information which she knew to be confidential.[253]

176. What had to be proved –and was not proved– was that she knew that the four facts for which she has been indicted were and remained confidential at the time of publication and, despite that knowledge, knowingly and willfully disclosed them. That is where the TC's failure to properly review the record of interview of Ms Hartmann is selective/incomplete/erroneous. In this interview, Ms Hartmann made it clear to the *amicus* investigator that she believed and understood that all the facts that were discussed in her book were in the public domain, came from public sources and could therefore be disclosed.[254] The *amicus* himself acknowledged that fact.[255] It is clear also from Ms Hartmann's interview that she had understood the Tribunal's failure to react to public discussions of these issues as an indication, right or wrong, that they were not being treated/regarded by the Tribunal as confidential.[256] In other words, and contrary to the TC's finding, she did not know that the facts relevant to the charges were and continued to be treated as confidential at the time of publication and did not willfully disclose information with that knowledge.

177. This is why, contrary to the TC finding (pars.56-57,62) the fact that she had not seen the impugned decisions was of significance: she did not know what was being covered by the confidentiality of these orders, was unable to ascertain that fact and could reasonably assume that the matters that she garnered from public sources were indeed public.

178. In the alternative, the Trial Chamber placed disproportionate weight upon her knowledge that the impugned decisions had originally been filed confidentially and failed to consider all of the evidence contrary to a finding of knowing/willful disclosure of confidential facts[257] and abused its discretion and/or committed an error of law/fact when so doing.

General failure to apply in dubio pro reo and relevant evidential standard

179. The Trial Chamber erred in law/fact and/or abused its discretion when it failed to apply the principle *in dubio pro reo* to the evidence, failed to exclude other

[253] E.g. P2.1,1004-2,6/21;P2.1,1003-2,5/13;P1.1 1002-1,3-4/10;T.144-146,311,492-494;P4.
[254] P1.1,1002-1,4/1;P.2.1,1004-2,6/21;1002-2,6/9;1003-2,3-4/13.
[255] REDACTED
[256] P.2.1,1003-2,8-11/13.
[257] See,above,and FTB,pars.87-96,110-123.

reasonable inferences compatible with Ms Hartmann's lack/absence of culpable *mens rea* and/or unreasonably excluded those. There was ample evidence on the record, all of which it disregarded, supporting the reasonable conclusion that Ms Hartmann had not formed the requisite *mens rea*.[258]

180. In particular, the TC erred in law/fact and/or abused its discretion when it failed to consider the possibility and/or excluded as unreasonable the conclusion that Ms Hartmann's conduct had been no more than negligent and, therefore, did not come within the terms of R77(a)(ii).[259]

Conclusions

181. In light of the above, the AC should

(i) find that the TC has erred,

(ii) find that each and all of these errors meet the relevant standard of review as the TC failed to establish Ms Hartmann possessed the culpable *mens rea* relevant to establishing her responsibility under R77(a)(ii)/international law,

(iii) apply the correct legal standards and consider the relevant evidence,

(iv) correct the TC's errors and

(v) enter a not guilty verdict.

IX. ERRORS AS REGARD MS HARTMANN'S *MENS REA* – ERRORS PERTAINING TO REGISTRY'S LETTER

Impugned findings

182. At pars.59-61, the TC relies upon a letter from the Registrar to Ms Hartmann dated 17 October 2008 which it says is "strongly suggestive of her state of mind". By relying upon this letter, the TC committed a grave error of law/fact and/or abused its discretion and caused great unfairness/injustice to Ms Hartmann.

TC's errors

[258] FTB,pars.87-96.See.e.g.T.137,144-146,271-276,281-282,311,314-315,340-341,372-374,384-404; 423-443,487-494;D5;D1;D2;D3;D46;D4;D6;D9;D36;D47;P2.1, 1002-2,1-2,4-7/9;P2.1,1003-2,2,7/13; P1.1,1002-1, 3-7/10;P2.1,1002-2,1, 6-7/9;1003-2,2,5-10/13;1004-2, 6, 9-11/21;P2.1,1004-2,7,11/21;*Ruxton* Statement,pars5-6.
[259] Ibid.

183. First, by allowing the *amicus* to use and tender that document and, subsequently, by relying upon it, the TC committed a serious violation of the guarantee of fair trial. Following several Defence requests to the *amicus* as regard the chain of custody of this document (which the *amicus* declined/failed to provide), the *amicus* undertook in writing that he would **not** use that document at trial. The Defence, therefore, dropped its investigation of the origin of this document and the legality of its use. However, the *amicus* later breached that undertaking during trial and tendered the document in evidence despite the Defence objections.[260] The Defence strongly objected.[261] The TC took no account of the unfairness and prejudice that it had caused. Nor did it require the *amicus* to produce the chain of custody of that document which, the Defence says, was obtained and then admitted illegally/impermissibly in violation of UN immunities/privileges,[262] without the necessary authorization from UN headquarters, without requiring the party tendering it to establish the legality of its reception and in violation of R89(D). The prejudice was all the greater that, by that stage, the Defence could (i) not conduct any investigation of the origin of that document, (ii) nor call any evidence to rebut the suggestion of the amicus that this document could be read as relating to the two impugned decisions. This resulted in the violation of Ms Hartmann's

(i) right to timely and detailed notice of the charges,

(ii) right to adequate time/resources to prepare,

(iii) right to an adversarial proceedings and

(iv) right to a fair trial.

184. Secondly, the TC erred in fact when suggesting that this document could be read as suggesting an awareness on the part of Ms Hartmann that she knew that any of the facts contained in the relevant pages of her book (pp.120-122[263]) and article were still treated as confidential by the Tribunal. Ms Hartmann has been charged with disclosing those facts, and none others. Nowhere is it suggested in P.10 that the Registrar had taken the view or suspected that Ms Hartmann had violated the confidentiality of a court order (let alone either of the two impugned decisions) in her book/article. Instead, it is clear from its content and the agreed facts that this letter

[260] D49,D50,D51,D52,D53,D54, REDACTED D56,D57,D66,D67.
[261] T.204-214.
[262] In particular,art.30 UN Convention on Privileges and Immunities.
[263] FTB,FN.1.

cannot be read as referring to any of the facts in relation to which Ms Hartmann's *mens rea* would have been relevant.[264] It was beyond dispute – and in fact agreed between the parties – that Ms Hartmann had not obtained the impugned information (for which she was charged) in the course of her occupation at the Tribunal.[265] In other words, the letter simply could not and could not reasonably be read as suggesting a reference to the impugned decisions of their content.[266] Revealingly, the letter only refers to UN regulations (that were attached to the letter) and not to Rule 185. Furthermore, nothing in the letter could reasonably be read as an indication that it referred to the two impugned decisions and/or their content, so that such letter could not be relied upon as an indication of her knowing and willful disclosure of these decisions/their contents. If the *amicus* intended to have the letter suggests anything else, it was his duty and obligation, as an "impartial" Prosecutor, to call evidence on that point. The necessary inference should have been drawn from his failure to do so and the TC erred when failing to do so.

186. There is another reason why it could not be read in that way. As noted by the Chamber,[267] the impugned article is a mere reproduction (in English) of passages of the book.[268] The book was written before the Registrar's letter was sent to Ms Hartmann so that it could not be indicative – retroactively – of her state of mind at the time of writing the book (nor the article, since it is no more than an English reproduction of passages of the book[269]).

187. Significantly, and having relied before on Ms Hartmann's interview, the TC failed to account for the fact that Ms Hartmann explained during her interview that she had regarded the Registrar's letter as pertaining, not to information contained in confidential Tribunal orders, but to her "duty of discretion" as a former UN employee.[270] In that sense, the TC committed a further erred of law and/or fact when it failed to consider and failed to exclude the reasonable possibility that Ms Hartmann

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[264] T.302-303;Defence Motion pursuant to Rule 65*ter*,7 February 2009 (point 8).
[265] id.
[266] Furthermore, Ms Hartmann had left her position as spokesperson prior to the second impugned decision (Defence Motion pursuant to Rule 65*ter*, 7 February 2009;Prosecution Statement of Admissions, 6 February 2009;FTB,par.2).
[267] Judgment,par.58.
[268] P2.1,1004-2,10-11/21.
[269] Ibid.
[270] P2.1,1004-2,8-9/21.

did not and could not regard the letter as referring in any way to the facts disclosed in the impugned pages of her publications.[271]

188. For these reasons, the TC erred in fact/law and violated Ms Hartmann's fundamental rights (including the principle *in dubio pro reo*) when admitting the P.10 and relying upon it to infer that Ms Hartmann possessed the requisite *mens rea* at the relevant time.

Conclusions

189. In light of the above, the AC should

(i) find that the TC has erred,

(ii) find that each and all of these errors meet the relevant standard of review as the TC failed to establish Ms Hartmann possessed the culpable *mens rea* relevant to establishing her responsibility under R77(a)(ii)/international law,

(iii) apply the correct legal standards and consider the relevant evidence,

(iv) correct the TC's errors and

(v) enter a not guilty verdict.

X. ERRORS AS REGARD MS HARTMANN'S *MENS REA* – MISTAKE OF FACT

190. The AC has made it clear that the accused must have been "put on clear notice that the material [in question] was subject to an order preventing disclosure" at the time of the impugned disclosure.[272] The AC noted further that –

> "it must be possible for the individual to determine ex ante, based on the facts available to him, that the act is criminal".[273]

[271] FTB,pars.87-96(and: See.e.g.T.137,144-146,271-276,281-282,311,314-315,340-341,372-374,384-404; 423-443,487-494;D5;D1;D2;D3;D46;D4;D6;D9;D36;D47;P2.1, 1002-2,1-2,4-7/9;P2.1,1003-2,2,7/13; P1.1,1002-1, 3-7/10;P2.1,1002-2,1, 6-7/9;1003-2,2,5-10/13;1004-2, 6, 9-11/21;P2.1,1004-2,7,11/21;Ruxton Statement,pars5-6; REDACTED.

[272] See *Marijacic* AJ,par 29 citing *Marijacic* TJ

[273] *Marijacic* AJ,par.43.See also *Jovic* AJ,par.27.

191. The Trial Chamber erred in law and/or fact and abused its discretion by failing to take into consideration any of the many factors present on the record that supported the reasonable conclusion that Ms Hartmann could reasonably have committed a mistake of fact on that point or, if it did, by failing to give them any weight. Many of those were cited by the Defence in its FTB, to which the TC paid no apparent regard and made no reference to.[274]

192. The TC's failure to take into account the right/interest of victims to receive the information included in Ms Hartmann's publications[275] is also relevant to any inference as regard Ms Hartmann's supposed awareness of the criminal character of her conduct. The reasonableness of Ms Hartmann's conclusion that her conduct was in conformity with the Tribunal's jurisdiction and, therefore, legal (rather than criminal), is further supported by her references to paragraph 7 of SC resolution 827.[276] The Tribunal's jurisdiction (including under R77) is limited by SC Resolution 827, in particular paragraph 7 which provides that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law".[277] This includes access to information relevant to establishing their claim of responsibility as pertained to the impugned information. The Appellant does not suggest that the Appeals Chamber acted in violation of Resolution 827 when granting the protective measures, nor does it challenge the legality of the impugned decisions. The Defence submits, however, that it would have been reasonable for Ms Hartmann to take the view that her publications were consistent with the overall mandate of the Tribunal and therefore legal. The evidence of Ms Kandic, Mr Joinet and Mr Kermarrec supports that view.[278] The TC's

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[274] FTB,pars.110-123(See.e.g.T.137,144-146,271-276,281-282,311,314-315,340-341,372-374,384-404; 423-443,487-494;D5;D1;D2;D3;D46;D4;D6;D9;D36;D47;P2.1, 1002-2,1-2,4-7/9;P2.1,1003-2,2,7/13; P1.1,1002-1, 3-7/10;P2.1,1002-2,1, 6-7/9;1003-2,2,5-10/13;1004-2, 6, 9-11/21;P2.1,1004-2,7,11/21;Ruxton Statement,pars5-6; REDACTED.

[275] See,above.

276 P3,P3.1;D47;Defence Motion pursuant to Rule 65ter,7 February 2009,Annex.

277 Also D36;D29;D38.See,also,ICTY President's Statement to UNGA (http://www.icty.org/sid/10244).

278 E.g.T.144-146,271,390-391.Also,D36.

failure to acknowledge these facts/evidence despite the Defence's explicit references constitutes and error of law/fact and an abuse of its discretion.[279]

193. Having failed to consider all of the relevant evidence, the TC erred in law and/or fact and abused its discretion when it failed to consider or rejected the reasonable conclusion that Ms Hartmann was mistaken in fact in relation to the question of whether the facts that she discusses in her publications continued to be treated as confidential by the tribunal at the time relevant to the charges (Judgment,pars.64,67). Because of limitations of space, the Defence refers to its submissions/evidence in FTB,pars.110-123 and adopts them by reference.[280] Particularly important in that regard are Ms Hartmann's own words which have not been impugned or disproved and which the TC failed to even acknowledge.[281] Those words are amply corroborated and supported by the record so as to render this finding a reasonable one on the evidence, which the TC erred in excluding.[282]

194. That error was compounded, is further established and is coupled with the TC's failure to acknowledge the requirement mentioned above that the accused must have been able to determine ex ante the criminal character of his/her conduct.[283] The TC did not require the *amicus* to prove that fact, did not subject the evidence to that requirement (which had been cited by the Defence;FTB,par.101) and erred/abused its discretion if it rejected the reasonable conclusion that Ms Hartmann had not formed a view that her conduct was criminal despite overwhelming evidence in support of such a conclusion.[284] Ms Hartmann's mistake negated both the alleged willfulness of here conduct and rendered a finding of "intent" unreasonable on the evidence. As pointed out by noted commentators, "[b]ecause proof of intention is required, honest mistake is a defence to an allegation of intentional contempt"[285]

195. The TC erred in law and/or fact (at par.64, as it had at par.58) when suggesting that Ms Hartmann's "acknowledgment" (as regard the fact that the

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279 FTB,pars.111-114;
280 Ibid.
281 P1.1,1002-1,3-4/10;P2.1,1003-2,2/13;P.1.1,1002-1,4(-5)/10;P2.1,1003-2,8-10/13;P.2.1,1004-2,10-11/21;P.2.1,1004-2,6/21;P2.1,1003-2,5/13.
282 See, in particular, T.144-146;271-276;314-315;390-391;D5;D36; REDACTED/14 January 2009,in particular Annexes.
283 *Marijacic* AJ,par.43.
284 See above.
285 R.Clayton and H.Tomlinson,*The Law of Human Rights* (2nd ed,Vol.1),par.15.95,citing from *AG v Observer Ltd*,[1988] 1 All ER 385 and *AG v News Group Newspapers plc* [1989] QB 110.Also Cassese,*International Criminal Law*(pp.290.*et.seq*).

decisions had been rendered confidentially) (P2.1,1003-2,pp.11-12) went to demonstrate her knowledge of the confidential character of the facts discussed in her publications and thus went to establish her culpable *mens rea* and excluding the reasonable possibility that she might have committed a mistake of fact in this matter. In the statement relied upon by the TC, Ms Hartmann was merely commenting upon the fact that the information that she had disclosed in her book correspond to the fact that one of the impugned decisions was rendered on 6 April 2006. This does not, in any way, goes to exclude the real and reasonable conclusion that she might have been mistaken about the fact that she believed in good faith that the information that she discusses in her book was not treated as confidential at the time of publication. Nor is the fact that she did not "check with the Tribunal" as she had no reason to believe it to be (i) necessary or (ii) appropriate/realistic.

196. In this context, the TC erred further –in law and/or fact– when suggesting that this "acknowledgment" provided evidence relevant to excluding the possibility that Ms Hartmann had committed a mistake of fact as regard the public/confidential character of these facts. Instead, the record of her interview clearly supports the view that, at the least, she might have misunderstood the scope and effect of the AC decisions and the effect of public disclosure/discussion of those on the confidentiality of their existence and content.[286] The *amicus* himself had acknowledged that much.[287] During her interview, Ms Hartmann had said this (which the TC failed to acknowledge/take into account):

> "I formally reject having ever knowingly violated any regulations and affirm that I never knowingly or willingly endeavored to hamper the course of justice, in any way."[288]

197. The Trial Chamber erred in law and/or in fact (at par.64) by taking into account the absence from Ms Hartmann's book of any reference to "public sources" as a factor relevant to concluding that she must have obtained that information from a confidential source or a source she knew to be confidential. This constitutes an impermissible reversal of the burden of proof as it assumes or infers that the

[286] See,e.g.,P1.1,1002-1,3-4/10.AlsoP2.1,1003-2,2/13.
[287] REDACTED
[288] P1.1,1002-1,4/10.

information must therefore be regarded as having come from a confidential source and/or exclude the reasonable possibility that it came from a public source. The inference is all the more inappropriate, that in no part of her book has Ms Hartmann cited any of her sources. It is a basic aspect of the work of journalists to not reveal their sources and Ms Hartmann insisted upon this fact during her interview with the *amicus*.[289]

198. The Trial Chamber erred in law and/or fact in footnote 142 of the Judgment where it drew inferences from the fact that the Defence had not produced evidence of the fact that, as mentioned in the PTB,par.53, Ms Hartmann's original manuscript did not contain any reference to the impugned Appeals Chamber's decisions. In so doing, it reversed the burden of proof and failed to take notice of a fact that was not being challenged by the *amicus* Prosecutor (although he had declined to formally agree to it). The reason why the original manuscript (which showed that Ms Hartmann's book did not contain any such reference prior to the ICJ Judgment and subsequent public debate) was not tendered was due to the *amicus*'s insistence that the entire manuscript (not just the relevant pages) should be tendered. The Defence disagreed as there was no good/legitimate basis for that request in view of the fact that the *amicus* had been able to review the entire manuscript and was able to ascertain that it contained no reference to the impugned decisions.

199. At paragraph 64, the TC erred in law and/or fact as to the matter in relation to which Ms Hartmann was said to have been mistaken, i.e., according to the Trial Chamber "with respect to the confidential status of the Appeals Chamber Decisions". That was not what the mistake pertained to: the fact that the impugned decisions had been rendered "confidentially" was made public by the Tribunal itself prior to the publication of Ms Hartmann's book/article so that the confidential character of that fact had been waived by an *actus contrarius*.[290] There was no mistake in that regard: she positively knew that fact to be public. What the mistake pertained to is the question of whether the facts disclosed by Ms Hartmann in her publications and in relation to which she was charged were and continued to be treated as confidential by the Tribunal. Because it failed to identify the relevant issue to which the mistake pertained, the TC erred when ignoring it and/or failing to give it any consideration and/or excluding the reasonable conclusion that such mistake in fact existed.

[289] E.g.P.2.1,1004-2,6/21;1002-2,6/9;1003-2,3-4/13.
[290] See above.

200. The AC should-

(i) take notice of these errors of law and fact,

(ii) acknowledge that these, individually or in combination, meet the requisite standards of review as they led the TC to convict Ms Hartmann despite the reasonable possibility that she was mistaken about the matters outlined above,

(iii) apply the relevant legal standards in light of the record of the trial

(iv) find that it is reasonably open on the evidence that Ms Hartmann might have been mistaken about the criminal character of her conduct and acquit her on that basis.

XI. ERRORS AS REGARD MS HARTMANN'S *MENS REA* – MISTAKE OF LAW

201. The TC erred in law and/or fact when rejecting (or failing to consider) the evidence and submissions that Ms Hartmann laboured under a mistake of law, failing to consider the relevant matters to which it pertained and/or abusing its discretion when doing so.[291]

202. The Trial Chamber erred in law and/or fact, as it did in relation to the issue of mistake of fact, by considering whether Ms Hartmann was mistaken as regard whether she knew that the impugned decisions had originally been rendered confidentially. The issue relevant to the charges was, instead, whether she could reasonably have taken the view that, in law, the facts discussed in her publications were not treated as confidential (for the reasons outlined in the Defence Final Brief) at the time relevant to the charges and that her conduct was, therefore, not criminal in character.[292]

203. The Trial Chamber erred in law, misrepresented the authorities cited in support of its finding and failed to take into account those that contradicted it, to suggest that a person's misunderstanding of the law could never excuse a violation of the law.[293] In so doing, it violated, not just international law,[294] but the binding

[291] Judgment,pars.65-67. See evidence cited above.
[292] See above.
[293] Judgment, par 65. See FTB,pars.99-109.
[294] E.g.Cassese,*International Criminal Law*,p.258;*In re B*,The Netherlands,Field Court Martial,Decision 2 Jan 1951,No.247,516-525;*In re Schwarz*,at 862-863. Also *Dobson v*

jurisprudence of the AC cited above.[295] The TC erred in law when suggesting that the *Jovic* (and *Haxhiu*) jurisprudence stood for a general exclusion of the defence of mistake of law.[296] Instead, it stands for the view –not contested and in fact accepted by the Defence- that it is not for an individual to decide whether an order of the tribunal is legal and therefore binding on him/her. Ms Hartmann did not decide to disregard the impugned decisions because she considered them to be illegal.[297] Her mistake (if indeed it is regarded as a mistake) was to believe that, as a result of the public disclosure by the Tribunal/Applicant/media, these facts were not, as a matter of law, anymore covered by the confidentiality orders that originally applied to them or, for some of them, that they had not been covered by the confidential order in the first place. Right or wrong, in light of the law's ambiguities/lack of certainty and the extensive public discussion of these matters,[298] that conclusion was a reasonable one and the TC erred when disregarding or rejecting it.[299] In other words, her mistake prevented the formation of a culpable *mens rea*.[300]

204. At no point did Ms Hartmann pretended or wished to arrogate for herself the right to decide for the Tribunal what should or can remain confidential.[301] It was her understanding, and a reasonable one in the circumstances, that this determination had been made by the Tribunal itself. In that sense, and in the words of the AC, there was no awareness on her part of the illegality of her conduct.[302]

205. The Trial Chamber erred in law by equating ignorance of the law with mistake of law when focusing on Ms Hartmann's genera awareness of a body of rules criminalizing contempt law before the Tribunal.[303] Ms Hartmann never claimed to be ignorant of the existence of Rule 77. It further erred in fact when stopping its consideration of the issue after having been satisfied that the recorded demonstrated

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Hastings; art.20(2)Regulation No.2000/15 on establishment of Panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15);Art.32 ICC Statute.

[295] *Marijacic* AJ,par.43 (and also par.29). Also *Jovic* AC,par.27.

[296] Judgment,par.65,FN.151.

[297] FTB,pars.105-109.

[298] E.g.FTB,pars.3-54.

[299] FTB,pars.97-123.

[300] See,again,art.20(2)Regulation No.2000/15(UNTAET/REG/2000/15);art.32 ICC Statute.

[301] E.g.P1.1,1002-1,4-5/10;P2.1,1002-2,6-7/9,1003-2,5-6,8-9/13;1004-2,10/21

[302] *Jovic* AJ,par.27.

[303] Judgment,pars.65-66.

"knowledge, rather than ignorance, of the law".[304] The mistake she made, if indeed she is regarded as mistaken on that point, and the one that was relevant to the TC's findings, pertains to-

(i) The fact that she believed that, due to the public disclosure of these facts by the Tribunal/applicant/media, the material in question was not any more the subject of an order preventing its disclosure and, therefore, about the criminal character of her conduct.

(ii) The fact that she could have reasonably believed that other matters (e.g.,the legal reasoning of the TC) were not subject to confidentiality in the first place.

The Appeals Chamber has made it clear that to commit a crime under R77, the accused must have been "put on clear notice that the material [in question] was subject to an order preventing disclosure" at the time of the impugned disclosure.[305] The TC erred in law/fact when it failed to apply that legal standard and failed to subject the evidence to it with a view to ascertain whether such mistake prevented her from forming the culpable *mens rea*.

206. Even if the TC were said to have identified and applied the correct legal test/standard, it erred in law/fact and abused its discretion by failing to take into consideration any of the many factors advanced on the record that supported the reasonable conclusion that Ms Hartmann could reasonably have committed a mistake as regard the criminal character of her conduct or when unreasonably disregarding them all or failing to give them their due weight. That evidence has already been mentioned above.[306] In particular, and in addition, the TC erred in law/fact and abused its discretion when it failed to exclude or rejected the reasonable possibility that Ms Hartmann might have laboured under a mistake as regard the criminal character of her conduct.[307]

[304] Judgment,par.66,*in fine*.
[305] See *Marijacic* AJ,par.29 citing *Marijacic* TJ.
[306] See,above;FTB,pars.110-123.
[307] Judgment,par.66.

XII. ERRORS AS REGARD THE EVIDENCE OF LOUIS JOINET

Impugned Findings

207. At footnote 176 of the Judgement, the TC held that the testimony of Louis Joinet "largely consisted of policy considerations and legal opinions. Consequently, the Chamber considers his evidence did not advance the Defence case." By disregarding the testimony of Mr. Joinet, the TC erred in law/fact and abused its discretion.

Disregarding the Entirety of Mr Joinet's Evidence

208. The Trial Chamber erred in deciding that the majority/essence of Mr.Joinet's evidence consisted of policy considerations and legal opinions and rejecting it on that basis. Mr.Joinet provided evidence directly relevant to *the facts and considerations* relevant to the curtailment of Ms Hartmann's freedom of expression, including[308]

(i) Evidence of novel criminalisation of conduct.[309]

(ii) The principle of proportionality in relation to the freedom of expression; lending support to the Defence case that the action against Ms Hartmann was not proportionate to achieve the legitimate aim pursued.[310]

(iii) The important role that journalists play in communicating the work of the international criminal tribunals and freedom of the press.[311]

(iv) The fact that restrictions and interferences with freedom of expression can actually impinge upon victims rights to obtain remedies in national courts and as such the paramount importance of transparency in war crimes proceedings.[312]

(v) The fact that the confidential decisions were already firmly in the public domain, lending support to the Defence case that Ms Hartmann made a reasonable assessment that the decisions were no longer classed as confidential by the Court.[313]

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[308] SeeT.368-369.
[309] E.g.T.271.
[310] T.368-369.
[311] T.252,285,378-379.
[312] T.258,283-290,312.
[313] T.281.

209. The Trial Chamber erred in sidelining/disregarding, and otherwise failing to properly consider, his testimony because it was said to consist of policy considerations and legal opinions that did not "advance the case". This is not a condition of admissibility of evidence, nor is it a sufficient/adequate basis for disregarding it.

210. Evidence pertaining to these matters was directly relevant and "advanced" the Defence case. Had the TC properly considered Mr.Joinet to be an expert witness rather than a witness of fact, an objection should have been made prior to oral evidence being given. Notwithstanding the provisions of Rule 65*ter,* despite the various status conferences and the Pre-Trial conference in the case, and regardless of the fact that the Defence provided the Trial Chamber and *amicus* Prosecutor with a summary of the proposed evidence of Mr. Joinet well in advance of the trial, no murmur of query was raised by either the Trial Chamber or the *amicus* Prosecutor as to the proper status of Mr.Joinet as a witness of fact. In the circumstances, the Defence had a legitimate expectation that Mr. Joinet's testimony would be given weight and be considered.

211. In any case and, furthermore, this would not have been a sufficient basis to disregard his evidence and/or the principles/facts that his evidence went to establish. Expert evidence has many times been given before the Tribunal, including on matters of laws/legal regulations and/or policy.

212. The TC erred by failing to properly consider the testimony of Mr.Joinet and/or abusing its discretion when rejecting it. The failure to properly consider the evidence of Mr. Joinet amounts to an error of fact/law and an abuse of the TC's discretion.

Failure to Apply a Consistent Standard Towards the Evidence

213. The principle of equality of arms requires that evidence tendered by the Prosecution and the Defence be evaluated/admitted under consistent evidential standards.[314]

214. The TC erred in law and/or abused its discretion by failing to apply a consistent standard to assess/evaluate/admit Defence and *amicus* evidence. The TC adopted inconsistent standards regimes in determining whether *viva voce* evidence amounted to expert evidence or was fact based and/or whether this fact would justify

[314] *Rutaganda* AJ,par.44.

the rejection of that evidence. More importantly, these disparate regimes led the TC to give weight to *amicus* witness Vincent and give while rejecting the evidence of Mr.Joinet.[315]

215. Even if the AC were to regard Mr.Joinet as an expert witness, then the criteria that led to this conclusion and apparently compelled the TC to disregard his evidence should also have been adopted towards the evidence of Mr.Vincent, whose evidence it admitted and heavily relied upon despite the fact that it was similar in character (legal/policy) to that of Mr.Joinet.[316] In so doing, the TC erred in law/fact and abused its discretion and violated Ms Hartmann's right to a fair trial and equality of arms.[317]

216. If the TC had applied its own reasoning consistently, the TC would have been compelled to find that Mr Robin Vincent had also been wrongly called by the Prosecution as a witness of fact, rather than as an expert witness, and should have disregarded his evidence.[318] The *amicus* had described the proposed evidence of Mr.Vincent in those terms:

> "He will provide the "big picture" concerning the work of international criminal tribunals, and the adverse consequences of deliberate breaches of confidentiality orders".[319]

217. The evidence of Mr.Vincent, based on his professional experience, was in line with the general suggestion and his evidence was both legal and judicial in character.[320]

Consistency in the admissibility of evidence is paramount if there is to be an equality of arms between parties and a fair trial for the accused.[321] In this case, the TC disregarded evidence which, if admitted, would have rendered its legal and factual findings impossible/unreasonable. Its errors in disregarding it, led the TC to ignore evidence that should have led to assessing the criminal character of Ms Hartmann's conduct and should have led to her acquittal.

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[315] Compare,Judgment,FN.176,and,FN.31,85,87,88,101,171,182,187.
[316] Ibid.
[317] See,*Rutaganda* AJ,par.44.
[318] See,Judgment,pars.38, 44, 72,74.
[319] *Amicus* PTB.
[320] E.g.T.196,153-154.
[321] *Jerusalem*,37.E.H.R.R.25,par.46.

218. The TC's evaluation of the status of this evidence is "wholly erroneous"[322] and as such the Appellant prays that the AC to substitute its own finding, evaluate Mr.Joinet's evidence and the principle it contains and find that it fully corroborates and supports the Defence submissions that the criminalisation of Ms Hartmann's conduct pursuant to R77(a)(ii) was impermissible, disproportionate and a violation of international law. The TC's failure to admit and consider that evidence was a grave error of law/fact and an abuse of discretion that meet the relevant standard of review.

219. Alternatively, the interests of justice (and fairness) demand that the evidence of Mr.Vincent should be disregarded. So central was the testimony of Vincent to the TC that the rejection of that evidence would, per se, justify the setting aside of Ms Hartmann's conviction.[323] Judgement needs to be set aside and the conviction overturned. The Appellant respectfully submits that the inconsistencies detailed above impinge upon the integrity of the Trial Judgement and the correctness of the verdict. These errors of law and fact alleged in this ground both invalidate the conviction and occasion a miscarriage of justice.

XIII. ERRORS REGARDING SENTENCING

Impugned Findings

220. The TC erred in law/fact and abused its discretion when sentencing Ms Hartmann to a 7,000 Euros fine.

TC's errors

221. The TC failed to subject its decision to convict and the sentence it imposed to the principle of proportionality.[324] In particular and in addition, the TC erred in law by failing to consider the "necessity" of its sentence and Ms Hartmann's ability (or otherwise) to pay. As such, the sentence is arbitrary and violates the requirement of necessity and proportionality as is relevant to both (i) any restriction of freedom of expression and (ii) any criminal punishment.[325]

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[322] *Kupreskic AJ.*

[323] See,again,Judgment,pars.38,72,77,80 and FN.31,85,87,88,101,171,182,187.

[324] *Orban,*pars.53-54.

[325] See above concerning requirement of "proportionality".See also *R.Northumberland Appeal Compensation Tribunal, Ex p Shaw*[1952],1 KB 338,350-351;*R v.Barnsley Metropolitan Borough Council, Ex p Hook* [1976]1 WLR 4 1052,1057-1058; *Bowe&Anor v The Queen* [2006]UKPC 10; [2006] 1 WLR 1623;*Spence v.The Queen* and

222. The TC erred in law/fact and/or abused its discretion when failing to consider any of the facts relevant to assessing (i) the necessity/propriety of a criminal conviction and/or (ii) of the sentence imposed. Many of those were laid down in the Defence FTB (in particular, in par.158). The general reference/disclaimer to the "parties' submissions"[326] may not make up for the lack of apparent consideration of these facts in the TC Judgment. Nor has the TC given any apparent consideration to the grave consequences of its sentence upon Ms Hartmann's family and her ability to travel (as a journalist) and find employment. Both are now greatly undermined/prejudiced by the TC's unnecessary and disproportionate conviction/sentence.

223. The TC also erred in law/fact and abused its discretion by giving undue weight to erroneous and irrelevant factors,[327] namely that the gravity of this offence is aggravated by the "real risk" that Ms Hartmann has said to have created "upon the Tribunal's ability to exercise jurisdiction to prosecute and punish serious violations of humanitarian law".[328] The question of the "real risk" is dealt with in detail above and need not be reiterated here in detail. It suffices to say that the TC erred in law/fact by taking into account a fact that (i) had not been established beyond reasonable doubt and/or (ii) used an incorrect legal standard to come to that conclusion.[329] The TC erroneously assessed the purported gravity of the conduct based upon hypothetical and unproven facts/consequences.

224. The TC erred in law/fact and abused its discretion when failing to consider and/or unreasonably rejecting the Defence's suggestion that a conditional discharge, as recognised, under international would have been both proportionate and appropriate in case of a conviction.[330]

225. The TC also erred in law/fact and abused its discretion when acting contrary to established jurisprudence, and erred in law by failing to pay sufficient regard to Ms Hartmann's personal situation.[331] The sentence imposed was not tailored to the

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Hughes v The Queen (unreported, 2 April 2001, Criminal Appeals Nos 20 of 1998 and 14 of 1997),per Saunders JA(A-G),par.216

[326] Judgment,par.85.

[327] These factors are addressed in detail above, in particular, under Ground VI and VIII.

[328] Par.80 Judgment.

[329] See,above.

[330] FTB,pars.167-17;*Brima* Sentencing Judgment,pars.53-54.See also*Heaney v Ireland. R Shayler*,(at281,per Kelly J);*Mahon v Post Publications*,par.62.

[331] *Brima*,pars.30-34.

circumstances of the Appellant at all. No, or no proper, enquiry was made by the Trial Chamber in this regard. It is submitted that this failure constitutes a discernable error necessitating the intervention of the Appeals Chamber. The sentence range proposed by the *amicus* Prosecutor in this case, and ultimately adopted by the Trial Chamber, was erroneous and did not fit in any way with any comparable cases that the TC could put forth as relevant to any sort of comparison.[332]

226. In any event, assessing the financial means of a person *prior* to imposing a fine is a well-established principle across most domestic legal systems. The TC made no such enquiry, effectively disregarded or gave no proper weight to the finding of indigence made by the Registrar (and/or abused its discretion in that regard). This has resulted in a deficient sentence being passed that requires appellate review and reversal. This is especially so when the consequence of an inability to pay the fine.[333]

227. As a result of these errors, the Appellant submits that the fine of 7,000 Euros is, in the circumstances of this case, manifestly unnecessary, disproportionate and inadequate.[334] No reasonable Trial Chamber, properly directing itself could have imposed a fine without making enquiries as to the Appellant's ability to pay that fine.

228. The Defence respectfully submit that, in the event that it is satisfied that the TC erred in imposing the sentence subject to this ground of appeal, the Appeal Chambers has the power to impose an alternative sentence of either a conditional discharge with conditions.[335]

XIV. ERRORS REGARDING THE ALLEGATION OF 'SELECTIVE PROSECUTION', LACK OF FAIRNESS OF THE PROCEEDINGS, ABUSE OF THE PROCESS AND RELATED ERRORS

General remarks

229. There has been a comprehensive failure on the part of the TC to consider and assess the consequences and effect of irregularities as occurred in the course of the investigation and/or prosecution of this case resulting in grave errors and the violation of Ms Hartmann's right to a fair trial. Because of the nature/scope of facts and issues

[332] *Amicus* PTB,pars.94-95.
[333] See , for example, Rule 77*bis*(C)(iv)
[334] R *v.*Solowan,[2008]3 S.C.R. 309,2008 SCC 62,par.16.
[335] FTB,pars167-171 and authorities cited.

relevant to this ground, the Defence refers to and adopt the extensive submissions and references given in the relevant filings mentioned below. Limitations of space do not permit the Appellant to review and point to each and all of the facts that pointed to the existence and nature of these irregularities.[336]

230. In short, all through the proceedings, the Defence was denied access to information and to the procedural mechanisms necessary to obtain information that would have allowed the Defence to establish the basis and circumstances under which Ms Hartmann was selected and identified for the purpose of investigation (then prosecution) and determine whether, in that context, any improper considerations or interferences had played a part and whether the irregularities/shortcomings of the *amicus* investigation/prosecution had rendered the case against her unfair.

231. All of the Defence's efforts were denied or rejected by the TC. As a result, the Defence's contention that the proceedings against Ms Hartmann –in particular as regard the process of investigation and indictment– constitute an abuse of the process has not been considered on its merit and the Defence applications that this matter be elucidated were erroneously rejected.

Decision on abuse of process

232. On 13 January 2009, the specially assigned Trial Chamber ordered the Defence to re-file its 9 January "Motion or Reconsideration and Stay of Proceedings".

233. On 23 January, the Defence filed its "Motion for Stay of Proceedings for Abuse of Process with Confidential Annexes" ("Motion") in which it sought an order from the specially assigned Trial Chamber to stay the proceedings for abuse of the process based on many procedural and substantive violations committed by the *amicus* Prosecutor/investigator as part of his investigation and preparation of the case against Ms Hartmann.

234. On 29 January, the *amicus* Prosecutor responded to the Defence Motion.[337]

235. During the 30 January Status conference, the Trial Chamber issued an oral ruling denying the Defence Motion in full, with written reasons to follow.[338] Written reasons were filed on 3 February 2009.[339]

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[336] Those have been extensively laid down in the Defence's Motions of 9, 14 and 19 January as are referred below.
[337] Prosecution Response to Defence Motion for Stay of Proceedings for Abuse of Process.
[338] T.45-46.

236. The following grounds of appeal pertain to the Chamber's Decision of 30 January 2009 with reasons of 3 February 2009.[340]

237. The Trial Chamber erred in law and/or fact when it held that its jurisdiction to stay proceedings for abuse of process required clear proof of the fact "that the rights of the Accused have been egregiously violated" and erred in law and/or fact when finding that this had not been the case in the present instance.[341] Such a test has no basis in law and contradicts existing Tribunal's jurisprudence on this matter.[342] Had it applied the relevant standard, and in light of the evidence put forth by the Defence in its Motion,[343] the TC would have found that an abuse of process, as properly defined, had in fact occurred in these proceedings and ordered a stay of proceedings. This, in turn, would have required the TC to consider the circumstances under which Ms Hartmann came to be investigated/indicted/prosecuted. In *Nyiramauhuko*, the ICTR made it clear that, given the gravity of allegations of contempt, any allegation of contempt must be brought on the basis of "properly prepared and substantiated submissions".[344] In this instance, the inadequate investigation of the *amicus* meant that its recommendation to the TC, which was the sole basis for the TC's decision to prosecute Ms Hartmann,[345] was unreliable, un-verified, one-sided, incomplete, misleading, marred by grave shortcomings and violations. The many failures of the investigative process had the effect of vitiating the exercise of the quasi-judicial discretion of the Trial Chamber to initiate contempt proceedings and cumulatively constitutes an abuse of process.

238. The Trial Chamber erred in law and/or fact and abused its discretion when it declined or failed to deal with a number of issues raised by the Defence because, it said (erroneously), they had already been resolved in the context of separate

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[339] Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process, 3 February 2009.

[340] Leave to appeal was filed on 9 February 2009 and rejected on 13 May 2009.

[341] Decision, par 4.

[342] See e.g. *Barayagwiza*, Decision, 3 November 1999,par.75;*R. v Horseferry Road Magistrates' Court, Ex Parte Bennett* (1994) 1 AC 42, cited with approval in *Prosecutor v Milosevic*, Decision on Preliminary Motions, 8 November 2001, par 49. See also *Levinge v Director of Custodial Services*, 9 NSWLR 546, cited in *Prosecutor v Nikolic*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, par 89.

[343] In particular,Motion,pars.5-10.

[344] *Nyiramauhuko*, Decision 10 July 2001,par.12; *R(Ebrahim) vFeltham.*

[345] Order 27 October 2008,par.1, *in fine*, and par.3.

applications.[346] None of these had been and never were. This resulted in a violation of Ms Hartmann's right to a fair trial and to a reasoned opinion.

239. The Trial Chamber erred in law when suggesting that UN immunities did not apply to interviews carried out as part of the *amicus* investigation (in particular the interview of Ms Hartmann, which included questions pertaining to her employment at the ICTY) and erred in law when suggesting that this investigation did not form part of a "legal process" for the purpose of the Convention on Privileges and Immunities of the United Nations.[347] The Trial Chamber erred in law and/or fact and abused its discretion when suggesting that the failure of the *amicus* investigator to seek and obtain UN waiver of immunities did not inure to the benefit of the accused and erred in law and/or fact when failing to address the consequence of such failure.[348] Her ICTY file from which the Registry's letter was taken (P10) and on which the TC relied heavily (Judgment,pars.59-61) was covered by such immunities which protected Ms Hartmann (like any other UN present or former employee) against unauthorized use/access. The TC further breached those immunities when relying upon Ms Hartmann's statements as pertained to her work at the Tribunal.[349]

240. The Trial Chamber erred in law and/or fact and abused its discretion when suggesting that the interview of Ms Hartmann (which related *inter alia* to her role/activities as ICTY-OTP spokesperson) did not require nor demand that her UN immunities be lifted and erred in law and/or fact and abused its discretion when failing to address the consequence of such failure.[350]

241. The Trial Chamber erred in law and abused its discretion when authorizing the *amicus* to conduct its investigation in a manner that was inconsistent with an existing order and without any record of this that was accessible and available to the Defence.[351]

242. The Trial Chamber erred in law and abused its discretion when suggesting that a Trial Chamber has the authority and power to waive the confidential character of an order of the Appeals Chamber.[352]

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[346] Decision, par 5.
[347] Decision, pars 6-7.See Motion,par.9(ii).
[348] Decision, par 7.
[349] E.g.Judgment,FN.33,106,134,138,149,150,154,155,158.
[350] Decision,pars.6-7.
[351] See,Motion,par.9(iii).
[352] Decision, par 8.

243. The Trial Chamber erred in law and/or fact and abused its discretion when failing to address and give reasons in relation to the Defence submissions at paragraph 9(iii) of its Motion (items 3 and 4) and its unreasonable rejection thereof.[353]

244. The Trial Chamber also erred in law and fact and abused its discretion when

(a) suggesting that the Defence was required to establish how the violations outlined in that paragraph of its Motion had impacted on the *amicus* investigation. No such requirement exists as a matter of law.[354] And when

(b) suggesting that the Defence had failed to do so.[355] Ms Hartmann was being prejudiced by the fact that the investigation was being conducted without adequate notice of the investigative activities and that the TC was deeply and personally involved (including through its legal officer) in the preparation and building of a case against her. This is the same –original- TC as rendered many decisions/orders which the new TC refused to set aside.[356]

245. The Trial Chamber erred in law and abused its discretion when suggesting that the *amicus* was not required to take and disclose statements of proposed witnesses and erred in law/fact and abused its discretion when it failed to consider what impact this had on the reliability of the report that was made to the Chamber, and, in turn, on the exercise of its discretionary power to initiate proceedings against Ms Hartmann.[357] It is clear that the law and practice of this Tribunal required taking/disclosure of such statements.[358] And so with the list of questions which the Defence had asked for and which the TC said need not provide.[359] It is equally clear that this failure prejudiced the Defence in its preparation.

246. The Trial Chamber erred further in that regard (at pars.10-11) and abused its discretion when:

(a) suggesting that only the rules pertaining to disclosure were relevant in this matter, and

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[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] Ground III.
[357] Decision, par 9.
[358] Urgent Defence Motion Requesting the Trial Chamber to Order the Amicus to Take and to Disclose to the Defence Statements of Proposed Witnesses,19 January 2009 (and *Addendum* of 20 January 2009).
[359] *Niyitegeka* Appeals Judgment,pars.30 *et seq*

(b) taking the view that the *amicus* was not required to provide information sought by the Defence.[360]

247. The Trial Chamber erred in law and/or fact and abused its discretion when it

(a) failed to address and provide reasons in relation to several of the submissions or facts advanced by the Defence as a basis for a finding that an abuse of the process had occurred;[361] and

(b) failed to ascertain the effect of such failures on the exercise of its discretionary power to initiate contempt proceedings, including the following:

(i) The *amicus* had failed to ascertain and to bring to the Chamber's attention the fact that the facts for which Ms Hartmann was being investigated had been made public by the Tribunal, the Applicant and in the media.

(ii) The *amicus* failed to pursue any line of investigation as might have been favourable to Ms Hartmann despite the fact that he was required to act as an impartial investigator.

(iii) The *amicus* failed to verify the reliability/credibility of information provided to him by interviewing before reporting it to the Trial Chamber.

(iv) The *amicus* obtained and used documents from Ms Hartmann's ICTY personnel file without authorization to do so and without waiver of UN immunities.

(v) During the interview of Ms Hartmann, the amicus pursued no line of inquiry that might have been favourable to Ms Hartmann and failed to give her an opportunity to comment upon or respond to some of the baseless allegations made by other interviewees only later to rely upon those allegations in his Report to the Chamber recommending the initation of contempt proceedings, effectively denying her the right to be heard and basic procedural fairness.

(vi) He failed to act with the requisite impartiality in the execution of his mandate as *amicus* investigator and Prosecutor.

(vii) He relied, for the purpose of his recommendation, upon the evidence of persons whose credibility/reliability he failed to verify.

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[360] Decision, pars 11-12.
[361] See Motion,par.9 and let(b) below.

(viii) He relied upon documents/information that were obtained in violation of the UN Convention on Privileges and Immunities and of Article 30 of the Statute.[362]

248. The Trial Chamber erred in law/fact and abused its discretion when it failed to consider the effect that many failures outlined in the Defence Motion had on the fundamental rights of Ms Hartmann and erred in law and abused its discretion by failing to address and remedy the prejudicial consequences of these failures. The proceedings against Ms Hartmann have been marred by irregularities and shortcomings, none of which has been addressed or remedied. The merit of each and all of the Defence's complaints, as outlined in its Motion, remain to be considered.

Subpoena Decision

249. On 19 January 2009, the Defence filed an "Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and to Disclose to the Defence Statements of Proposed Witnesses" in which it sought to obtain from the Chamber an order to the *amicus* Prosecutor to take and disclose statements of his proposed Rule 65*ter* witnesses.[363] On 29 January, the specially-appointed Trial Chamber rendered its Decision in this matter, denying the Defence Motion in full.[364] Its reasons were given in a written decision of 3 February.[365]

250. On 2 February, the Defence filed an "Urgent Defence Motion to Stay Time Limits for Filing and Rule 73 Applications for Certification" in which the Defence prayed the Chamber to stay the time limits to file any motion for leave to appeal. In an order of 4 February, the Trial Chamber rejected the Defence Motion of 2 February and ordered the Defence to file any Motion for leave to appeal within seven (7) days

[362] See above.
[363] The *amicus* Prosecutor responded on 22 January 2009.
[364] Decision on Urgent Defence Motion Requesting the Trial Chamber to Order the *Amicus* to Take and to Disclose to the Defence Statements of Proposed Witnesses ("Impugned Decision").
[365] Reasons for Decision on Urgent Defence Motion for the Issuance of Subpoena to Amicus Curia Prosecutor,3 February 2009.

of this Order.[366] Its Motion for leave to appeal the Trial Chamber's decision was later denied.[367]

251. The TC's decision denying the Defence Motion for *subpoena* contains several errors of law and/or fact. The failure of the Trial Chamber to grant the subpoena – compounded by the fact that it failed and refused to ask any questions pertaining to the investigation to the amicus Prosecutor –resulted in grave unfairness to Ms Hartmann, unfair proceedings and a potential miscarriage of justice.

252. At paragraph 5 of the impugned Decision, the Trial Chamber erred in law/fact and abused its discretion when it stated that it "will not interpret the current request for a subpoena to summon Mr MacFarlane for an interview as a request for issuance of a subpoena to appear as a witness at trial." This was the case and should have been dealt with as such.

253. The TC also erred in law (in particular, at pars.14-15 of the Impugned decision) when misinterpreting or misapplying the Appeals Chamber's jurisprudence as regard conditions of the issuance of subpoena.[368] Whilst the TC initially concurred with the Defence upholding the correct test found in *Kristic*[369], namely that a reasonably liberal approach should be taken in deciding whether the information will materially assist the defence, and furthermore its overall necessity in ensuring that the trial is informed and fair, it then went on to circumvent this test by stating what was actually necessary in exercising its discretionary rights under Rule 54 was "extraordinary circumstances", and that it would be insufficient to merely show that the information will materially assist the Defence. This erroneous and novel test has no legal basis and as such invalidates the decision made there under.

254. The TC erred in law/fact and abused its discretion when it failed to detail and provide a reasoned decision as to why the Defence could be said to have failed to demonstrate that there was a "chance" that the investigating officer would be able to give information that would assist the Defence case and/or abusing its discretion when reaching that view. The prima facie indications given by the Defence in its

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[366] Order Varying Time Limits for Filing of Applications for Certification.
[367] Decision on Defence Motion for Certification to appeal Trial Chamber's Decision Regarding the Issuance of a Subpoena to the Amicus Curiae Prosecutor, 19 May 2009.
[368] In particular, Impugned Decision, pars 5-6. See.e.g. *Krstic*,Decision on Application for subpoenas,1 July 2003,par.8. See again Defence Motion Seeking Certification of Trial Chamber's 'Reasons for Decision on Urgent Defence Motion for the Issuance of Subpoena to Amicus Curiae Prosecutor' Dated 3 February 2009, 9 February 2009, in particular par 6.
[369] *Kristic*Decision on Application for Subpoenas,1 July 2003,pars.10-11.

Motion (and its Motion of abuse of process of 14 January 2009) provided an adequate and sufficient basis for that request.

255. The Trial Chamber erred in law/fact when taking the view that the matter raised issues of testimonial privileges. The TC identified no valid basis for that conclusion. In addition and in the alternative, even if such privileges had existed, the Trial Chamber would have erred in law and/or fact by giving precedence to those over the right of the accused to a fair trial.

256. The Trial Chamber erred in law/fact and/or abused its discretion (at par.13 Impugned Decision) when dismissing the Defence submission that the *amicus* investigator was "in an identical position to an investigating officer in a criminal case" and taking into account irrelevant or insufficient factor to dismiss the Defence's application, including:

- That he had professional and prosecutorial experience;
- That he had been assigned/appointed for that reason.
- That he had prosecutorial experience/expertise (contrary to an investigative officer).[370]

257. The Trial Chamber erred in law/fact when failing to give any, or sufficient, regard to the Defence inability to obtain the required information through any other witness. This resulted in the Defence inability to obtain evidence of the scope and nature of investigative/prosecutorial irregularities for which prima facie evidence existed.

258. The Trial Chamber erred in law and/or fact when suggesting that it would only be required to issue the subpoena in "the most extraordinary circumstances".[371] No such test exists under the law of the Tribunal. This resulted in the unreasonably narrow interpretation of the circumstances under which a subpoena should have been issued in the present case. In addition and in the alternative, and even if such a test had existed in law, the Trial Chamber could be said to have erred in law and/or fact when concluding that the circumstances of the case were not such as to warrant the issuance of the subpoena sought.

[370] Ibid.
[371] Impugned decision, par 14.

259. The Trial Chamber erred in law and/or fact when taking into account considerations that were irrelevant to its considerations and failing to consider factors relevant to the Defence request.[372] This is true, in particular of the following factors:

- Costs and delays in proceedings involved in replacement of counsel (par.14);
- The fact that it might trigger similar requests in other cases (ibid);
- Suggesting that counsel could submit questions to the Prosecutor (par.15) only to criticize the Defence for doing so later and refusing to ask those questions as were relevant to establishing the scope and nature of the irregularities of the investigation/prosecution of this case;[373] That requirement does not form part of the law of the Tribunal and constitutes an error of law. It also constitutes an error of fact and/or abuse of discretion as the TC failed to demonstrate and/or satisfy itself that any such mechanism was shown to have been available to the Defence and/or adequate in the circumstances.
- That the Defence would be able to make submissions on the shortcomings of the investigation without first being able/permitted to establish the scope thereof by interviewing the person responsible for that investigation (ibid);
- To suggest that the Defence would be able to obtain that information by enquiring with the *amicus* Prosecutor (ibid) while knowing from the record of proceedings that the *amicus* had refused/rejected all such requests;

260. By denying the Defence Motion for a subpoena, the Trial Chamber erred in law and/or fact by violating the right of Ms Hartmann to equality of arms, to an adversarial hearing and to a fair trial. The TC effectively put evidence relevant to Ms Hartmann's complaint about the irregularities of these proceedings beyond its reach.

Overall effect of the decisions

261. Compounded by the complete failure of the *amicus* to investigate a decharge, the refusal of the Trial Chamber to allow the Defence to access relevant records[374]

[372] See,e.g.Impugned Decision, pars 14-15, 17.
[373] T.500.*et.seq*.
[374] REDACTED.

and the Chamber's refusal to look at the way and manner in which the investigation was conducted and by its refusal to allow the Defence to raise these issues with the Appeals Chamber prior to trial, resulted in a complete failure to look into the merit of the Defence's complaints and into the fairness or otherwise of the process that had led up to the indictment of Ms Hartmann. As a result, the prosecution/trial of Ms Hartmann could not be said to have been fair. The TC had no jurisdiction to give Ms Hartmann anything short of a fair trial.

262. The above errors, individually or in combination, meet the relevant standard of review and warrant the overturning of what is an unsafe and unfair prosecution and conviction.

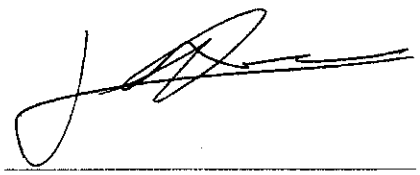
Conclusions and relief sought

263. Each and all of the above errors, whether individually or in combination, resulted in a miscarriage of justice (errors of fact) or invalidated the judgment (errors of law).

264. As for relief, the Defence seeks the reversal of the Trial Chamber's finding that Ms Hartmann is guilty of two counts of contempt of court pursuant to Rule 77(a)(ii) and her full and complete acquittal of all charges.

Respectfully submitted,

Karim A. A. Khan
Lead-counsel for Florence Hartmann



Guénaël Mettraux

Co-counsel for Florence Hartmann

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